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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

K.O. Mohamed Sulaiman & Co. .. *Petitioner**

v.

State of Madras represented by the Secretary to the Government of Madras, Revenue Department (Commercial Taxes) Fort St. George, Madras and another .. *Respondents.*

Madras General Sales Tax Act (*I of* 1959), *sections* 19 *and* 24—*Construction and scope—Arrears of sales tax due by firm or partner thereof—Recovery as arrears of revenue by seizure of movables of another firm in which such partner is also a partner—Legality—Right of State to seize movables of latter firm—Share of partner in assets of firm—Liability to attachment and sale in execution of decree or order for his individual debt.*

Where a person happens to be a common partner in two firms, the State, while realising arrears of sales tax due from one of the firms or from him as a partner of that firm, is not entitled to seize the movable properties of the other firm, of which also he is a partner, which firm, however, is not liable for the sales tax in question. For realising the arrears of sales tax due by a dealer from out of his assets, the State can claim and assert only such rights as the dealer himself has over those assets, and cannot claim any higher or superior right. So long as the partnership, whose assets are sought to be seized, is a going concern and there has been no dissolution and settlement of account among the partners *inter se* no partner can assert or predicate that he is the owner of any particular share in any particular asset, movable or immovable.

The charge referred to in section 24 of the Sales Tax Act is a charge on the properties of the person liable to pay the tax under the Act. No item of partnership property can be said to be individual property of any one of the partners.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a Writ of *mandamus*, directing the second respondent to return to the petitioner 1,000 tanned hides seized from the petitioner's premises on 4th July, 1962, in pursuance of the Form No. 2 demand, dated 4th July, 1962, issued by the 2nd respondent under clause (1) section 6 of the Act VI of 1887.

V. K. Thiruvenkatachari, for *T. T. Srinivasan*, *A. N. Rangaswamy* and *B. T. Seshadri*, for Petitioner.

S. Mohan, for the Additional Government Pleader on behalf of the Respondents, 1 and 2.

The Court made the following

ORDER :—This writ petition raises the question, *i.e.*, if a person happens to be a common partner in two firms, the State, while realising the arrears of sales tax

* W.P. 989 of 1962. 28th August, 1964.

due from one of the firms or from him as a partner thereof, is entitled to seize the movable properties of the other firm, of which also he is a partner, which firm, however, is not liable for the sales tax in question.

The brief facts are: the dealer, Azimunnissa and one Abdul Majid Sahib were carrying on business under the name and style of H.M.S. Kurshid & Co., from the year 1954 and the firm was dissolved in 1958. A sum of Rs. 16,724-39 nP. is due from this firm by way of sales tax for the assessment years, 1955-56 and 1956-57. The petitioner is carrying on business as a firm under the name and style of K.O. Mohamed Sulaiman & Co. This is a partnership concern which was started in 1951 and it is still carrying on business as a firm. Azimunissa, referred to earlier, is also a partner of the petitioner firm. For the realisation of the arrears of sales tax, Rs. 16,724-39 nP. aforesaid due and recoverable from Azimunnissa, as one of the partners of H.M. S. Kurshid & Co., the Department seized the Avery Weighing Machines and thousand hides and skins from the premises of petitioner, K.O. Mohamed Sulaiman & Co. It is not disputed that the aforesaid movables are the assets of the firm, K.O. Mohamed Sulaiman & Co. It is alleged that the weighing machines belong to the petitioner firm, while the hides and skins were held by it as bailee on behalf of the customers for export. For the purpose of the present enquiry that does not make any different. On representations made by the petitioner, the attachment of the Avery Machines has not been effected and they have been returned to the petitioner.

This writ petition has been filed questioning the right of the State to seize and take possession of specific items of assets (in the insant case, movables) belonging to the petitioner firm for realising the arrears of sales tax due from a dealer (in respect of his other business activities) on the ground that he happens to be a partner of the petitioner firm. Mr. V. K. Thiruvenkatachari, learned Counsel for the petitioner, contended that for realising the arrears of sales tax due from a dealer from out of his assets, the State can claim and assert only such rights as the dealer himself has over those assets and the State cannot claim any higher or superior right. He urged that so long as the partnership is a going concern and there has been no dissolution and settlement of accounts amongst the partners *inter se*, no partner can assert or predicate that he is the owner of any particular share in any particular asset, movable or immovable, and that it is only after a dissolution and settlement of accounts he may become the owner of any item of partnership property depending upon the terms of dissolution and settlement. Until dissolution the member of the partnership cannot claim a right to separate enjoyment and possession of any asset of the firm; nor can he exclude or prevent the firm or the partners of the firm from enjoying and being in possession of the property on behalf of the firm. According to learned Counsel the result, therefore is that no person, whether State or any creditor, to whom moneys are due from an individual partner of a firm can, under the guise of recovering such moneys, take physical possession by seizure, thus excluding and preventing the partners of the firm from using and being in enjoyment and possession of the assets of the firm. Learned Counsel contends that the State may have a right to obtain a garnishee order or file a suit for dissolution and for taking of accounts for the purpose of working out the rights of the dealer with a view to obtain satisfaction of the claim out of any assets that may be allotted or allottable to the dealer on such dissolution and settlement of accounts, and that till that stage is reached, the State cannot possibly take possession of the assets by seizure. I have no hesitation in accepting this contention of learned Counsel as it is a well-settled and evident position of law. It is a matter of surprise that the State should persist in this unfounded and untenable claim.

Looking at the provisions of the Act and the Rules, I find that there is absolutely nothing in them to warrant the procedure adopted by the State. Section 19, dealing with the liability of firms, runs as follows:

"19. *Liability of firms.*—(1) Where any firm is liable to pay any tax or other amount under this Act, the firm and each of the partners of the firm shall be jointly and severally liable for such payment.

(2) Where a partner of a firm liable to pay any tax or any amount under this Act retires, he shall notwithstanding any contract to the contrary, be liable to pay the tax or other amount remaining unpaid at the time of his retirement and any tax or other amount due up to the date of retirement, though unassessed."

Even though there was no provision corresponding to this in the Act of 1939, it has been held that the arrears of sales tax due would be a joint and several liability of the partners. Vide *Ponnusami Gramani* v. *Collector, Chingleput*[1]. The relevant portion of section 24 of the Act of 1959 which provides for the payment and recovery of the tax runs thus :

"*Section 24.—Payment and recovery of tax*—(1) The tax assessed under this Act shall be paid in such manner and in such instalments, if any, and within such time, as may be specified in the notice of assessment, not being less than twenty-one days from the date of service of the notice. If default is made in paying according to the notice of assessment, the whole of the amount outstanding on the date of default shall become immediately due and shall be a charge on the properties of the person or persons liable to pay the tax under this Act. (2) Any tax assessed or any other amount due under this Act from a dealer or person and any fee due from him under this Act, may without prejudice to any other mode of collection be recovered

(a) As if it were an arrear of land revenue, or

(b) on application to any Magistrate, by such Magistrate as if it were a fine imposed by him:

Provided that no proceeding for such recovery shall be taken or continue as long as he has, in regard to the payment of such tax, other amount or fee, as the case may be, complied with an order by any of the authorities to whom the dealer or person has appealed or applied for revision, under sections 31, 33, 35, 36, 37 or 38........................."

The learned Government Pleader contended that, because section 24 provides that if there should be a default in the payment of sales tax the same shall be a charge on the properties of the person liable to pay such tax, the State would be entitled to enforce that charge by the seizure and sale of the properties (the movables) in question. I see no force in this contention. It must be noticed that the charge referred to in section 24 is a charge on the properties of the person liable to pay the tax under this Act. As observed earlier, in the case of assets of a partnership it is impossible to have a conception that any property of the partnership is the individual property of anyone of the partners.

This question of the right to realise the debt due from a person from out of an asset or property which he owns jointly and is in possession of along with others has come up for consideration in this Court, as well as in other High Courts and all the decisions have uniformly taken the view that the creditor has no right to seize or take possession of "joint property" conveniently referred to as such. Section 24 (2) which provides that the tax assessed may be recovered as if it were an arrear of land revenue or on application to any Magistrate as if it were a fine imposed by him does not advance the contention of the State. As will be seen presently from the decision to be referred to, there is no distinction in the application of the principle above said, between a private creditor and the State seeking to recover its dues, whether tax liability or a fine imposed.

In *Samuvier* v. *Ramasubbier*[2], a Bench of this Court held that a deed of dissolution of the assets of the partnership which consisted of both moveable and immovable property should be only by a registered document. In dealing with the precise nature of the right of a partner over the assets of the firm, the Bench held that even though partners are joint owners of the partnership assets, no partner however has any right to any specific item of the partnership property as representing his.

In *Annamalai* v. *Annamalai*[3], a suit was filed by the plaintiffs (partners of a firm) for their share in the assets or debts of the firm realised by the other partness (defendants) while the firm was a going concern and a dissolution had not taken place. The Court held that no partner has a right to take any portion of the partnership property and claim that it is his exclusively, during the existence of partnership or after it has been dissolved. The legal position was explanied thus at page 148 :

"The plaintiff in this suit cannot legally assert any right to a specific portion of the deposit made by his partners with the Rangoon firm. His only right is to take steps for an account being taken of the

1. (1960) 2 M.L.J. 169 : 11 S.T.C. 80.
2. (1931) 60 M.L.J. 527 : I.L.R. 55 Mad. 72.
3. A.I.R. 1919 Mad. 146.

liabilities and assets of the Mandalay firm and to claim his proportionate share of the balance so arrived at. A partner cannot be allowed to take one item of the firm's assets, divide it into equal shares according to the number of partnership shares, and ask to be given one share without first having an account taken of the partnership liabilities and deducting the sum total of them from the aggregate assets of the firm."

In *Ramappa* v. *Thirumalappa*[1], a Bench of this Court, following *Samuvier* v. *Ramasubbier*[2], already referred to, held that a deed of dissolution of a partnership which provided that the immovable properties of the firm should not be divided amongst the partners of the firm but should be held by them as joint tenants with equal rights required registration, under section 17 of the Indian Registration Act. Reference may be made to the following observations at page 976:

"Up to the time of dissolution the partners must be regarded as joint owners of the properties within the meaning of section 253, but they were not entitled to specific shares and the rights they possessed were subject to the liabilities of the partnership on dissolution. Until an account had been taken and provision had been made for the discharge of the liabilities, no partner could claim to be entitled to have a definite share in a particular asset. In allotting on a dissolution what remains after making provision for the firm's debts, and the remaining assets include immovable properties, it does not follow that the partners will take the immovable properties in equal shares, even if they had equal rights in the partnership. What each partner receives will depend on the circumstances and the nature of the assets which remain for division."

In *Pyare Lal* v. *Mt. Misri*[3], it was held by a Bench of the Allahabad High Court that the property of the firm belonged to the firm and none of the partners had any right to treat any property as his individual property and to transfer it as such.

Order 21, rule 47 of Civil Procedure Code, provides the machinery for proceeding against the interest of a Judgment debtor in the moveable property belonging to him and another as co-owners. Order 21, rule 49, provides the machinery for execution of a decree obtained individually against a partner. It is unnecessary to refer to the decisions arising under the aforesaid provisions in which it has been held that the creditor has no right to seize any movable property either belonging to the Judgment debtor and others as co-owners or belonging to the firm.

I shall now refer to the decisions which have dealt with the question of the right of seizure of movables where they belong to several persons in joint ownership. In In re, *Marina Narasanna*[4], it was held that while recovering the fine imposed upon a person under section 386 or section 88 of the Code of Criminal Procedure, the Crown has no right to anything more in joint movable property than the delinquent himself had and it cannot deprive the co-owners, by seizing the property, of their right of possession in it, and that the correct procedure is to follow the provisions of Order 21, rule 47, Civil Procedure Code. The learned Judge held that there can be no seizure of any interest in the property other than the separate individual property of the delinquent.

In *Kolli Venkataraman* v. *The Collector of Kistna*[5], the Crown, for the purposes of recovering a fine due from a member of a joint family (a son) of which the father was the manager, attached and seized the standing crops on certain family properties. The father raised an objection on the ground that the property in question was his own separate property and that in any event, even if the property should be regarded as joint family property, the Crown had no right to seize the standing crops. It was held, even assuming that the property was joint family property, the defaulter's share was unascertained and the father was entitled to object that the Crown had no right to seize the crops, and that such a seizure clearly infringed the rights of the father, the managing member of the joint family.

In *Emperor* v. *Pramatha Bhooshan Ray*[6], a Bench of the Calcutta High Court, following In re, *Marina Narasanna*[4], held that movable property in which the offender has only a fractional share is not liable to attachment by seizure and sale under section 386 (1) (*a*) of the Criminal Procedure Code.

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1. (1939) 2 M.L.J. 649 : I.L.R. 1939 Mad. 971 (976).
2. (1931) 60 M.L.J. 527 : I.L.R. 55 Mad. 72.
3. A.I.R. 1940 All. 453.
4. (1932) 63 M.L.J. 142 : I.L.R. 55 Mad. 1041.
5. (1936) 70 M.L.J. 717.
6. I.L.R. 60 Cal. 932.

In *Bansraj Das* v. *Secretary of State*[1], for the realisation of the fine due from the son, the Government got an order of attachment of certain buffaloes and bullocks belonging to the joint family. On an objection raised by the father, it was held that the property is owned by the coparcenary and not by the offender individually and that where property is owned by several persons in which the offender may have an interest which is unascertained, there can be no seizure of any of the properties of the family.

The same view has been taken in a recent Bench decision of the Andhra Pradesh High Court in *Buchi Ramiah* v. *Rukkamma*[2], in which it was held that for the realisation of the maintenance due under an order passed by the Magistrate under Section 488, Criminal Procedure Code, the movable properties of the joint family of which the husband was one of the members cannot be attached and seized under section 386 (1) (*a*), Criminal Procedure Code.

In 28 Halsbury's Laws of England, 3rd edition, page 544, para. 1055, the law is stated in these terms :

> " As a writ of execution cannot issue against any partnership property except on a judgment against the firm, partnership property cannot be taken in execution for a separate judgment against one partner."

I am therefore of the clear opinion that the State had no right to seize the moveable properties of the petitioner-firm. It is needless to observe that the State may pursue any other right, it may be legally entitled to, in appropriate proceedings for the purpose of working out the rights of the assessee in the petitioner-firm. In the present writ petition the Court is only concerned with the limited question of the right of the State to seize the movable properties of the petitioner.

The writ petition is allowed and a writ of *mandamus* will issue as prayed for. No costs. The bank guarantee furnished shall be cancelled by the departmental authorities concerned and returned to the petitioners.

P.R.N. ——— *Petition allowed. Writ issued.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Janarthanam .. *Petitioner**

Criminal Procedure Code (V of 1898), *section* 561-*A—Frequent stoppages of proceedings due to non-readiness of prosecution followed by fresh charge-sheets—Amounts to abuse of process of Court—Justifies quashing of proceedings under section* 561-*A.*

Where after a charge-sheet for an offence was filed against the accused the proceedings in Court was stopped under section 249 of the Criminal Procedure Code, due to the non-readiness of the prosecution on as many as eight or nine occasions each time the police filing a fresh charge-sheet ;

Held, the proceedings should be quashed under section 561-A of the Criminal Procedure Code. Though the prosecution might not have intended to harass the accused, the filing of repeated charge-sheets, without the prosecution being in a position to secure the witnesses for the effective hearing of the case, would itself amount to harassment as well as abuse of the process of the Court justifying the quashing of the proceedings in exercise of the inherent powers of the High Court in the interest of justice.

Petition under sections 561-A, 435 and 439 of the Code of Criminal Procedure, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to quash the proceedings in C. C. No. 13063 of 1963 on the file of the Seventh Presidency Magistrate of the Court of the Presidency Magistrate, Egmore, Madras.

R. Subbier, for Petitioner.

B. Sriraman, for the Public Prosecutor on behalf of the State.

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1. A.I.R. 1939 All. 373.
2. (1960) M.L.J. (Crl.) 473: (1960) 2 An.W.R. 57 : A.I.R. 1961 A.P. 43.

* Crl. Misc. P. No. 2274 of 1963. 21st April, 1964.

The Court made the following

ORDER :—This is a rather unfortunate case. The petitioner, who is the accused in C.C. No. 13063 of 1963 on the file of the Seventh Presidency Magistrate, Egmore, Madras, has filed this petition, for quashing the proceedings, under section 561-A and other sections of the Criminal Procedure Code. The main ground urged by the petitioner is that, after the charge-sheet against him was filed by the police on 9th July, 1962, the proceedings in the Court of the Seventh Presidency Magistrate were stopped by the Magistrate, due to non-readiness of the prosecution to proceed with the case on as many as nine occasions, each time the Police filing a fresh charge-sheet, sometime after the stopping of the proceedings by the Magistrate under section 249, Criminal Procedure Code. It is alleged by the petitioner that the present renewal of the charge-sheet is the tenth in the series and that this procedure has caused unnecessary hardship to the accused, and amounts to an abuse of the process of Court, so as to attract the provisions of section 561-A of Criminal Procedure Code.

I called for a report from the learned Seventh Presidency Magistrate on this allegation. His report is that it was a fact that the case had been stopped on eight previous occasions and that the present charge-sheet is the 9th or the 10th in a successive chain. Even assuming it is the ninth in the chain of successive stoppages under section 249, Criminal Procedure Code, and followed by renewal of the charge-sheet by the Police, such frequent stoppages followed by fresh charge-sheets show that there was something wrong in the way in which the case was being dealt with by the prosecution. A look at the charge-sheet shows that the case against the accused was a simple one under section 4 (1) (*a*) of the Madras Prohibition Act. It is alleged that he was found in possession of four bottles of Tincture Gingiberis, a medicinal preparation containing alcohol, without the requisite permit or licence. The charge cites two prosecution witnesses besides the Prosecuting Sub-Inspector. The particulars about these two witnessess are given as "Arumugham, M.S.V.B. Road, (and) Krishnan, Rundalls Road," Learned Counsel for the petitioner points out that the vague way in which the particulars of these witnesses are supplied in the charge-sheet would show that the prosecution had completely lost touch with these witnesses, and that they were frivolously keeping the proceedings alive, not knowing the whereabouts of these witnesses. There is some force in this contention, because neither the fathers' names of witnesses nor the number of the premises where, they are to be found in the roads mentioned are given in the charge-sheet. It is well-known that Nethaji Subhas Chandra Bose Road is one of the busiest and longest roads in Madras City, and to locate the witnesses by reference to the road only, without any further particulars about the house-number or room-number would be a waste of efforts.

Learned Public Prosecutor argued that, if the particulars of address of the witnesses are given, the six accused might tamper with them. The accused resides in V. V. Koil Street, Choolai. It is hardly likely that he would be able to exert much influence as to tamper the witnesses, who live in an entirely different locality. It is also mentioned by the Public Prosecutor that the Sub-Inspector of Police was ill for a portion of the time. But it would have been possible for the prosecution to have waited till his recovery from the illness and, on satisfying themselves that the witnesses could be conveniently secured, after ascertaining their addresses, for the hearing of the case, they could have filed a fresh charge-sheet and the case disposed of once for all. But the fact that they had to file charge-sheet on as many as 9 occasions, each proving infructuous, would clearly show that even at the present moment the prosecution is unable to lay its hands on the proper witnesses to prove their case.

My attention has been drawn to a decision of the Allahabad High Court in *Bir Singh* v. *State*[1] where a single Judge referred to the fact that, while the High Court would not interfere at an interlocutory stage of any proceeding pending before a

1. A.I.R. 1952 All. 610.

subordinate Court, in exceptional cases it might become necessary to do so. Thus where successive complaints were filed with the obvious intention of causing harassment to the accused without prosecuting them, there would be abuse of the process of the Court justifying the quashing of the proceedings in exercise of the inherent powers of the High Court in the interest of justice. Here, though the prosecution might not have intended to harass the accused, it is clear that the filing of repeated charge-sheets, without the prosecution being in a position to secure the witnesses for the effective hearing of the case, would itself amount to harassment as well as abuse of the process of the Court. I am of the opinion that this is a fit case for exercise of the powers under section 561-A of the Criminal Procedure Code. I Accordingly quash the proceedings before the lower Court.

V.K. *Proceedings quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. M. ANANTHANARAYANAN, *Officiating Chief Justice.*

Lily White .. *Petitioner* *

v.

R. Muniswami .. *Respondent.*

Contract Act (IX of 1872), sections 23 and 74—Loss of article given to launderer for dry-cleaning due to negligence—Measure of damages—Printed condition in bill given to customer restricting claim to 50 per cent of market price—Condition opposed to public policy and not enforceable.

When an article entrusted by a customer to a firm of launderers for dry-cleaning is lost due to their negligence, the launderers cannot insist that they are bound to pay to the customer, by way of damages, only 50 per cent of the market price or value of the article lost on the ground that the bill handed over to the customer contained a printed condition to that effect. The customer will be entitled to the full market price of the article lost. A term which is *prima facie* opposed both to public policy and to the fundamental principles of the law of contract cannot be enforced by a Court merely because it is printed on the reverse of a bill and there is a tacit acceptance of the term when the bill was received by the customer. Certainly the conditions printed on the reverse of a bill may well govern or modify any simple contract. But if a condition is imposed which is in flagrant infringement of the law relating to negligence and a bill containing this printed condition is served on the customer, the Court will not enforce such a term which is not in the interests of the public, and which is not in accordance with public policy.

Petition under section 115 of Act V of 1908 praying the High Court to revise, the Decree of the New Trial Bench, Court of Small Causes, Madras dated 26th October, 1964 and made in N.T.A. No. 252 of 1964 (S.C.S. No. 7746 of 1963, dated 7th September, 1964—II Judge, Court of Small Causes, Madras).

M. A. Ghatala, V. Narayanaswami and *K. R. Ramabhadran*, for Petitioner.

The Court delivered the following

JUDGMENT :—This revision proceeding is sought to be instituted by a firm of launderers and dry cleaners, M/s. Lily White, who were defendants in a small cause action. The facts relating to the proceeding are certainly exceptional, and of a considerable degree of interest upon the question of trade ethics, and the claim of the revision petitioner, quite tersely stated, is to enforce an obligation which is opposed to public policy and the common law. On 13th May, 1963, the plaintiff in the case gave a new saree (6 yards in length) and a blouse, to the firm of the revision petitioners for dry-cleaning. The revision petitioners undertook to dry-clean the articles and to re-deliver on 18th May, 1963. Admittedly, the saree was never re-delivered, and it must be held that the garment has disappeared, though only negligence is alleged against revision petitioners in this respect, and not *mala fides*. The plaintiff, in essence, claimed the market value of the entrusted article.

The defence to this action was a very curious one. On the reverse, of the bill, which is generally handed over by the firm to customers when receiving articles for dry-cleaning, certain conditions are printed. Under Condition No. 2, the customer

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*C.R.P. No. 2472 of 1964. 11th December, 1964.

was entitled to claim only 50 per cent of the market price or value of the article, in case of loss. The present action relates to the *saree* alone, the blouse having been subsequently traced and recovered. The short point is whether the revision petitioners can insist that they are bound to pay only 50 per cent of the market value of the *saree* lost, it being a matter of concession that the loss occurred during entrustment, and due to the negligence of the firm.

On this aspect, all that learned Counsel for revision petitioners is able to put forward as an argument is that here is a document (Exhibit D-2), a letter written by the plaintiff to the firm, in which he expressed his willingness to settle the dispute between the parties, taking the market value of the saree as Rs. 220. It is urged that the proposed settlement is, by implication, in terms of the printed conditions on the reverse of the bill, so that the plaintiff cannot claim more than Rs. 110. The learned Judge decreed the suit for the entire market value of Rs. 220 and the New Trial Bench confirmed this decree. The only point before me is whether clause 2 of the terms is valid in law, and can be enforced as between the parties.

On this aspect, the learned Judge observed that the condition relating to restriction of the claim to 50 per cent of the market price, "is not enforceable on public grounds. If this condition is enforced, then, any laundry owner will try to misappropriate new clothes." The New Trial Bench was in entire agreement with this line of reasoning.

It appears to me to be very clear that a term which is *prima facie* opposed both to public policy and to the fundamental principles of the law of contract, cannot be enforced by a Court, merely because it is printed on the reverse of a bill, and there is a tacit acceptance of the term when the bill was received by the customer. Certainly, the conditions printed on the reverse of a bill may well govern or modify any simple contract, such as the contract in the present case, which was to entrust an article for dry cleaning, and to pay due charges for that service, subject to the obligation on the part of the businessman to perform the process properly, and to return the article safe and intact. But, if a condition is imposed, which is in flagrant infringement of the law relating to negligence, and a bill containing this printed condition is served on the customer, the Court will not enforce such a term, which is not in the interests of the public, and which is not in accordance with public policy. Actually, it is a matter of some surprise to me that the revision petitioner-firm has thought it fit to press this matter in revision, and there is certainly justification for the observation, both of the trial Judge and the New Trial Bench, that this may well be putting a premium upon the abstraction of clothes, which may be committed by the employees of a firm, intent on private gain, though the firm itself may be blameless with regard to the actual loss. The revision has no merits whatever, and it is dismissed.

V.K. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

H. H. Naeems & Co., Madras-3. .. *Petitioner**

v.

The Additional Commercial Tax Officer,
V North Madras City .. *Respondent.*

Madras General Sales Tax Act (I of 1959), section 24 (3) and section 61—Levy of penalty for non-payment of tax—If could apply to assessments made under the earlier Sales Tax Act (IX of 1939).

Section 24 (3) of the Madras Sales Tax Act empowering levying of a penalty for delay in payment of the tax assessed under the Act is a new provision introduced by the Act of 1959. It cannot be held to have any application to proceedings under the earlier Act IX of 1939 which did not provide for any such penalty whatever the extent of the delay in making the payment of the tax assessed thereunder.

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*W.P. No. 1167 of 1962. 11th December, 1964.

What section 61 (1) (ii) of the later Act of 1959 saves, even after its amendment by Act X of 1963, is only a fine, penalty or other liability which has been incurred under the old Act. Section 61 of the new Act cannot impose a new liability in respect of something done under the old Act which act of commission or omission did not invite any such penalty then.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the petitioner's assessment to sales tax for the year 1952-53 on the file of the respondent and to quashing the notice of demand of penalty dated 4th September, 1962 bearing Assessment No. 5716/52-53 and penalty Register No. 63/62-63.

V. Balasubrahmanyan and *V. Kunchithapatham*, for Petitioner.

The Additional Government Pleader on behalf of the Respondent.

The Court made the following

ORDER.—For the assessment year 1952-53, the petitioner was assessed to sales tax on 15th February, 1956. It preferred an appeal and that appeal, which was pending by the date of passing of Act I of 1959, was taken on file and disposed of by the Assistant Commissioner of Sales Tax. The collection of tax was stayed pending appeal. The appeal was however dismissed on 15th October, 1960. Thereafter, a notice of demand was served upon the petitioner on 8th June, 1961 and the tax was paid on 24th August, 1962.

On 4th September, 1962, the Additional Commercial Tax Officer issued a notice purporting to be under section 24 (3) of the Act demanding a penalty of Rs. 6,368-89 nP. The reason was that the payment of the tax as assessed was delayed by the assessee and the period for which the penalty was levied was from the date of passing of Act I of 1959. The legality of this levy is questioned in this writ petition and *certiorari* has been prayed for to quash the demand. It is claimed by the petitioner that the provision in the new Act, enabling penalty to be levied for delay in the payment of the assessed tax, is a new one, and it does not in terms apply to tax which was assessed under the repealed Act. In any event, it is claimed by the petitioner that since the collection of the tax was stayed pending disposal of the appeal and could be lawfully collected only on the issue of the notice of demand on 3rd August, 1961, the authorities were incompetent to levy the penalty firstly during the period when the order of stay of collection was in force, and secondly, for any date prior to the disposal of the appeal.

In the counter-affidavit filed on behalf of the State of Madras, the facts are not disputed. It is claimed that by virtue of section 61 of Act I of 1959, the order of assessment made under the old Act is deemed to have been passed under the new Act, and that therefore the levy under section 24 (3) of the Act is legal. It is denied that the petitioner is entitled to the relief prayed for.

Section 24 of Act I of 1959 deals with the demand and recovery of tax. This provision purports to deal with the " tax assessed under this Act". Sub-section (3) reads thus:

" If the tax under this Act or any instalment thereof is not paid by any dealer or person within the time specified therefor in the notice of assessment or in the order permitting payment in instalments the dealer or person shall pay by way of penalty, in addition to the amount due, a sum equal to......"

Then follows the method of calculation of the quantum of penalty. It is the contention of the petitioner that unless the tax has been assessed under this Act, that is, Act I of 1959, this provision will have no application whatsoever. It is urged that the contention of the Department that section 61 confers power to levy a penalty is not correct. Section 61 of the Act, as it was originally passed by Act I of 1959, was amended by Act X of 1963 and was made retrospective in its operation. After providing by sub-section (1) (i) for the repeal of the Madras General Sales Tax Act, 1939, sub-section (1) (ii) reads thus :

" (ii) The repeal of the said Act by clause (i) shall not affect—

(a) anything done or any offence committed or any fine or penalty incurred or any proceedings begun before the commencement of this Act ; or

(*b*) any previous operation of the said Act or anything duly done or suffered thereunder ; or

(*c*) any right, privilege, obligation or liability acquired, accrued or incurred under the said Act or

(*d*) any fine, penalty, forfeiture or punishment incurred in respect of any offence committed against the said Act ; or

(*e*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, fine, penalty forfeiture or punishment as aforesaid ; and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such fine, penalty, forfeiture or punishment may be imposed, as if this Act had not been passed. "

It is a significant feature of this provision that it contemplates, broadly speaking, any penalties or liabilities suffered under the old Act, and the last portion of the above clause " any such fine, penalty forfeiture or punishment may be imposed as if this Act had not been passed " emphasises the legal position that this sub-clause, deals only with the liabilities under the old Act. Sub-clause (iii), which is virtually a reproduction of old section 61 (1) proviso, states generally that anything done or any action taken under the said Act, that is, the Act of 1939, shall be deemed to have been done or taken under the corresponding provision of this Act, that is, Act I of 1959. But that is subject to the provisions of clause (ii) extracted above. It may be mentioned that clause (ii) of section 61 (1) was put in by Madras Act X of 1963 as an entirely new provision, while sub-clause (iii) as amended makes an order of assessment under Act IX of 1939, an order of assessment deemed to be one under the new Act, it does not proceed any further. Under the old Act, there was no provision for imposing a penalty for delay in payment of the assessed tax. Section 24 (3) is a new provision and a penalty which the law, that is, Act IX of 1939, did not provide for, cannot be held to have any application to proceedings under that Act. The penalty in terms of section 24 (3) is incurred when the amount of tax is not paid within 21 days from the date of service of the notice. On the date of the assessment which was in 1956, no penalty was incurred, whatever the extent of the delay in making the payment thereof. What section 61 (1) (ii) saves is only a fine, penalty or other liability which had been incurred under the old Act. The relevant clause of section 61 cannot accordingly be so interpreted as to impose a new liability after the passing of Act I of 1959 in respect of something done under the old Act, when such an act of commission or omission did not invite any such penalty.

This question came up for consideration in W.P. No. 1391 of 1962 (*Messrs. Abdul Rahim* v. *D.C.T.O., Gudiatham*) before Ramakrishnan, J. There the petitioner had been assessed to tax for the year 1950-51 under Act IX of 1939. After Act I of 1959 was passed, the Department made an order on 3rd November, 1962 demanding penalty of an amount of Rs. 1,455 and odd under the provisions of section 24, sub-section (3). The contention of the petitioner was accepted by the learned Judge. The conclusion was expressed in these words :

" In my opinion, no authority is really necessary for the clear position that the penalty levied in this case, which the new Act alone contemplates but not the old Act, cannot be imposed retrospectively in respect of an arrear of sales tax which became due before the new Act and that nothing in the transitory provision in section 61 will justify its levy."

It is noteworthy that the learned Judge dealt with the matter in the light of section 61 before it was amended by Act X of 1963. In my view, the position has been made even clearer by this amendment. It follows that the levy of penalty is wholly unsupported by the provisions of law.

The petition is allowed. The petitioner will be entitled to its costs. Counsel's fee Rs.100.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

R. Kalyanasundaram Pillai .. *Petitioner**

v.

M. N. Palaniappa Mudaliar & Sons, represented by Angappa Mudaliar, Partner and another .. *Respondents.*

Provincial Insolvency Act (V of 1920), sections 43 and 5—Unconditional annulment of the adjudication in insolvency without notice to creditors—Propriety—If binding on the creditors—Section 5—Power of the Insolvency Court to review its order.

An annulment is in the nature of a punishment of the insolvent for his laches and such an order cannot affect the rights of the creditors. An unconditional annulment without any directions as to the vesting of the insolvent's properties in the Official Receiver for distribution to the general body of creditors and without even notice to the petitioning creditor will defeat the very object of the creditor getting the debtor adjudged insolvent. Principles of natural justice clearly require that before an adjudication is annulled notice should be given at least to the petitioning creditor.

Even though there is no specific provision in the Provincial Insolvency Act conferring powers of review the Insolvency Court can review its orders under section 5 of the Act.

Petition under section 75 of the Provincial Insolvency Act praying the High Court to revise the Order of the District Court of East Thanjavur at Nagapattinam dated 3rd March, 1962 and made in C.M.A. No. 25 of 1961 preferred against the order of the Court of the Subordinate Judge of Mayuram dated 14th August, 1961 and made in I.A. No. 276 of 1961 in I.P. No. 5 of 1958.

T. R. Ramachandran, for Petitioner.

K. Raman, for 1st Respondent.

The Court made the following

ORDER.—One Kalyanasundaram Pillai who was adjudged insolvent in I.P. No. 5 of 1958 on the file of the Su ordinate Judge, Mayuram, is the petitioner in this Revision Petitio . The short oint that arises for decision is whether the unconditional annulment of his adjudication under section 43 of the Provincial Insolvency Act is valid and binding upon the creditors, as the annulment was made without notice to them.

In this case, the petitioner was adjuged insolvent on 4th December, 1959 and one year time was fixed for the debtor to apply for discharge. As no application was filed for obtaining discharge, the Official Receiver moved the Insolvency Court on 21st December, 1960, for the annulment of the adjudication, and it was accordingly annulled by order of Court dated 23rd December, 1960. The petitioning creditor filed an application, out of which this Revision Petition arises, on 13th March, 1961, for extending the time for discharge, and the petition was returned on the ground that the adjudication had already been annulled. He amended the petition praying that the order of annulment of adjudication should be set aside, as no notice was issued to him. The learned Subordinate Judge took a too narrow and technical view of the petition of the petitioning creditor and dismissed it, holding that, so long as the order of annulment stood, the petitioner (first respondent herein) was not entitled to file. a petition for extension of time for applying for discharge. But on appeal, the learned District Judge came to a contrary conclusion, holding that the petition filed by the petitioning creditor could be well regarded as containing a prayer for setting aside the order annulling the adjudication, since no notice was given to the general body of creditors or at least to the petitioning creditor. In this view, he set aside the order of the Subordinate Judge and remanded the matter giving liberty to the petitioning creditor to apply for extension of time for applying for final discharge.

Mr. T. R. Ramachandran, learned Counsel for the petitioner, contended that, of the various provisions which provide for annulment of adjudication like sections

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*C.R.P. No. 1069 of 1962. 15th December, 1964.

35, 37, 39, 41 and 43, certain sections provide for notice to the creditors, while section 43 does not contain any provision that, when adjudication is annulled, notice should go either to the petitioning creditor or to the general body of creditors. He also urged that in the Rules framed under the Provincial Insolvency Act containing the form of notice and the formalities to be complied with when notice of particular proceedings is published there is no provision for any notice to be issued in respect of annulment of adjudication under section 43. From this alone, I am not inclined to hold that no notice need be issued to the petitioning creditor or the general body of creditors, when the adjudication is annulled under section 43. In *Shankar Lal* v. *Bansidhar*[1], it was held that notice should be issued at least to the petitioning creditor before the adjudication was annulled under section 43. The observations of Venkatasubba Rao, J., in *Jethaji Peraji Firm* v. *Krishnayya*[2] lend support to this view that notice should be issued before the adjudication is annulled. It must be noticed that, when the adjudication is annulled under section 43, it is in the nature of a punishment imposed upon the insolvent for not having applied within time fixed for discharge, with the result that the protection which is available to him under the provisions of the Insolvency Act is no longer available. Learned Counsel for the respondents contends that in such a situation, especially when the order of annulment is unconditional and, there is no order under section 37 vesting the properties in the Official Receiver for distribution for the benefit of the general body of creditors, their interests would be seriously prejudiced. It is obvious that, if the adjudication is annulled without any condition as to vesting of the properties in the Official Receiver under section 37, the purpose for which the petitioning creditor filed the insolvency petition and got the debtor adjudged insolvent would be completely frustrated ; principles of natural justice clearly require that before an adjudication is so annulled, notice should be given at least to the petitioning creditor.

It is settled law that, even though there is no specific provision in the Provincial Insolvency Act conferring powers of review, the Insolvency Court can review its orders under section 5 of the Provincial Insolvency Act. It is sufficient to refer to the Bench decision of this Court in *Satyanarayana Rao* v. *Official Receiver*[3] which followed the earlier decisions in *Abbireddi* v. *Venkatareddi*[4] and *Ayyasami Chetty* v. *The Official Receiver, Coimbatore*[5]. The petition filed by the petitioning creditor can well be regarded as a petition to review the order. The order of the Insolvency Court in not setting aside the annulment is set aside. The matter shall be disposed of as indicated in the judgment of the learned District Judge.

The Civil Revision Petition is dismissed with costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

Sha Manakchand .. *Petitioner**

v.

Sankarji Moolchand .. *Respondent.*

Madras Buildings Lease and Rent Control Act (*XVIII of* 1960), *section* 14 (1) (*b*)—*Landlord requiring building* bona fide *for demolition—Scope of—Burden of proof.*

The question of the *bona fide* requirement of a landlord of a building for immediate demolition and reconstruction under section 14 (1) (*b*) of the Madras Buildings Lease and Rent Control Act is sometimes difficult to adjudge and it is impossible to lay down any hard and fast rule. *Bona fides* will be a matter for decision in each case on its own facts and cannot rest upon a mere averment or claim by landlord. It is not the intention of the Legislature that in every case *bona fides* should be presumed unless the tenant establishes *mala fides*.

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*C.R.P. No. 2369 of 1964. 1st January, 1965.

1. I.L.R. (1937) All. 855.
2. (1930) I.L.R. 52 Mad. 648 at 652 : 57 M.L.J. 116.
3. (1947) 2 M.L.J. 425 : A.I.R. 1948 Mad. 233.
4. (1920) 51 M.L.J. 60.
5. (1925) 61 M.L.J. 719.

Where there is nothing in evidence except that a plan has been obtained and the interested testimony of the landlord, the Court will be justified in rejecting an application under section 14 (1) (*b*) of the Act.

Petition under section 25 (1) of Madras Buildings (Lease and Rent Control) Act XVIII of 1960 praying the High Court to revise the Decree of the Court of Small Causes (Chief Judge), Madras dated 18th July, 1964 and passed in H.R.A. No. 93 of 1964 against H.R.C. No. 509 of 1963, Rent Controller, Madras.

K. R. Ramabhadran, for Petitioner.

The Court made the following

ORDER.—In my view, the learned Chief Judge of the Court of Small Causes was perfectly justified in allowing this appeal by the tenant against the order of eviction, and, there is no case whatever for entertaining a revision, upon the application of the landlord, from that judgment. The question of the *bona fide* requirement of a landlord of rented premises, for immediate demolition and reconstruction, under section 14 (1) (*b*) of the Act, is sometime difficult to adjudge. Each case has to be judged upon the totality of its facts, and it may be impossible to lay down any hard and fast rule. The matter was considered by me, in certain of its aspects, in *Mohsin Bhai* v. *Hale & Co., Madras*[1]. It has also been considered by Kailasam, J., in *Ramachandran* v. *Kazim Khaleeli*[2] and reference was made to my decision in the judgment of the learned Judge. The two decisions are, in my view, perfectly in harmony with each other, and there is no conflict. No rigid rule can be formulated with regard to the age of the building, and, it is certainly not necessary that the building should be of a particular age, to justify the requirement for demolition. But, needless to say, it is commonsense to presume that very old buildings are likely to have been so weakened in their structure by age, as to make immediate demolition essential, in the interest of the landlord ; that is not likely to be the case, with regard to recent buildings of sound construction.

In the present matter, the evidence adduced by the landlord was extremely meagre and tenuous, and, apart from the fact that the landlord had obtained a plan (Exhibit P-1) for reconstruction, and made previous attempts, there was nothing for the Court to go upon, except his interested evidence. As I pointed out in *Mohsin Bhai* v. *Hale & Co., Madras*[1], an application under section 14 (1) (*b*) of the Act may be made with an ulterior purpose and, in implementing a statute which has been primarily designed by the Legislature for the protection of tenants from unjust or undue eviction, the Courts must take care to be satisfied that the requirement of section 14 (1) (*b*) is established on the totality or complex of circumstances in the individual case. *Bona fides* will be a matter of decision in each case on the facts, and cannot rest upon a mere averment or claim by the landlord. If a contrary view were to prevail, it would imply that where a landlord claims *bona fides*, that would have to be conceded, unless the tenant establishes *mala fides;* that does not appear to have been the intention of the Legislature at all. In the present case I am fully satisfied that the requirements were not established, and that the learned Appellate Judge was justified in his view that the application ought not to have been allowed. The revision proceeding is accordingly dismissed.

R.M. *Revision dismissed*

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1. (1964) 2 M.L.J. 147.
2. (1964) 77 L.W. 632.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Ganapathy Padayachi .. *Petitioner**

v.

Sri-La-Sri Subramania Desika Gnanasambanda Pandarasannadhi Avergal, Dharmapuram Mutt, Dharmapuram, Tanjore District .. *Respondent.*

Madras Cultivating Tenants' Protection Act (*XXV of* 1955)—*Order for deposit of rent by a particular date—If eviction could be ordered on the same date for failure to deposit—Power of Court under to set aside* ex parte *order.*

It is well settled that where a Court fixes a date for the fulfilment of a certain condition, the person on whom that obligation is imposed will have the whole of that day for complying with that order even though on practical and administrative grounds it may happen that after specified hours he may not be able to comply with that order. Hence when the Rent Court directed a tenant to deposit the arrears by a particular date, it cannot order eviction on the same date on the ground that the tenant has not made the deposit.

Under Rule 8 of the Rules framed under the Cultivating Tenants Protection Act the Rent Court has ample jurisdiction to set aside *ex parte* orders and restore cases dismissed for default.

Petition under section 6 (*b*) of Act XXV of 1955 as amended by Act XIV of 1956 praying the High Court to revise the Orders of the Revenue Court, Kumbakonam dated 17th April, 1962 and 12th June, 1962, and respectively made in P. No. 398 of 1962 and in M.P. No. 53 of 1962 in P. No. 398 of 1962.

T. R. Venkataraman, for Petitioner.

T. M. Chinnayya Pillai, for Respondent.

The Court made the following

ORDER.—These two Revision Petitions are preferred by a tenant, and arise out of proceedings instituted under the Madras Cultivating Tenants Protection Act, 1955. The petitioner had to pay arrears of rent, Rs. 79-24. He was directed to deposit the amount in Court on or before 3rd April, 1962. He paid part of the amount towards arrears and was granted time till 17th April, 1962 for the payment of the balance. He had applied for more time, but was not granted. On 17th April, 1962 when the matter was called in Court, he was absent and the arrears had not been paid, with the result that the Court passed orders directing eviction of the petitioner. The next day the petitioner came up with an application setting out that he was under the impression that time had been granted till 18th April, 1962 and had noted the date of hearing as 18th April, 1962. The Revenue Court rejected this application for setting aside the *ex parte* order in the view that it was his duty to have noted the date correctly and, secondly, the Revenue Court had not been conferred with the power to set aside *ex parte* orders. One Revision is directed against the order made on 19th April, 1962, directing eviction. The other Revision Petition is directed against the order refusing to set aside the *ex parte* order for eviction.

With reference to the first one, learned Counsel appearing for the petitioner points out that the Court having granted time till 17th April, 1962, the petitioner, under law, had the whole of 17th April, 1962, for making payment. It may be that for the purpose of administrative convenience the time during which amounts would be received may be limited. It may be that out of office hours, he may not be able to comply with the order. But this practical difficulty it is contended by the petitioner, does not mean that he had not the whole of the day for making the payment. The argument is that, having had the whole of the day for payment, no order on non-payment could be passed on 17th April, 1962 itself. For this position, reliance is placed on the decisions of this Court and, in my opinion, they directly cover the point (*Janakumara Nainar* v. *Periaswamy Goundan* and *others*[1], and *M. Ct. Muthiah* v. *Deputy Controller of Estate Duty, Madras*)[2]. In *Janakumara Nainar* v. *Peria-*

*C.R.P. Nos. 1135 and 1648 of 1962. 1st January, 1965.

1. (1948) 2 M.L.J. 368.
2. (1964) 1 M.L.J. 279.

swamy Goundan and others[1], in an execution application filed on 24th September, 1945, which was in time allowed by law, time for complaince with certain orders of the Court was extended periodically and finally time was granted till 2nd November, 1945. But on the 2nd November, 1945 itself it was dismissed for non-compliance with the orders. This Court held, on appeal therefrom, that the Court had no jurisdiction to dismiss the application on the 2nd of November, 1945 itself. The decision of this Court in *Perumal Nadan* v. *Sivamanji Nadachi*[2], *Muthu Chettiar* v. *Narayana Chettiar*[3], and *Chinniah Chettiar* v. *T. Kumaraswamiah*[4], were followed. The principle of the decision is that, when the Court fixes a date for the fulfilment of a certain condition, the person on whom that obligation is imposed, will have the whole of that day for complying with the order. It follows that in the present case the Court had no jurisdiction to pass an *ex parte* order directing eviction on the 17th April, 1962 itself.

On the very next day, the petitioner had come up and submitted to the Court that he had noted 18th of April as the date of hearing. On that date he also deposited the arrears as claimed and produced into Court the challan in proof of compliance, along with the petition for setting aside the *ex parte* orders. The Court rejected this application, as already stated, in the view that the Court had no power to set aside *ex parte* orders. It is obvious that the attention of the Court was not drawn to the Rules framed under the Act empowering the Court not only to pass *ex parte* orders, but to set them aside for good cause. Rule 8 of the Rules entitled the Madras Cultivating Tenants Protection Rules, 1955, provides that every Court constituted under the Act shall have the powers exercisable by a civil Court in the trial of suits, and over and above this, certain powers are particularly set out and of this Rule 8 (ii) (*f*) is the one which provides for passing of *ex parte* orders and setting them aside for good cause. Rule 8 (ii) (*g*) provides the ordering and dismissal for default of appearance and setting aside such orders for good cause. It follows, therefore, that the Court had ample power and jurisdiction to set aside the *ex parte* order if good cause was shown.

Evidently, in the view the Court had no jurisdiction, the matter has not been gone into fully. It appears to me from the conduct of the petitioner that he must have been under a *bona fide* impression, and it is needless to remit the matter back again for deciding this matter. But these proceedings had been necessitated by the petitioner by his own act and, in the circumstancs, he must pay some cost to the respondent in these proceedings. While allowing both the Revision Petitions, I direct that the petitioner shall pay the respondent a sum of Rs. 35 as and for costs in C.R.P. No. 1648 of 1962. The order of eviction is set aside. The respondent may draw out the money deposited by the petitioner in the Revenue Court. There will be no order as to costs in C.R.P. No. 1135 of 1962.

R.M. ——— *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

T. R. Babu (Minor) by guardian Saguna Leelavathi and others.. *Petitioners**

v.

M. S. Shanmugham Chettiar and others .. *Respondents.*

Madras Civil Courts Act (III of 1873), section 4 (a) and Civil Procedure Code (V of 1908), section 24—Scope of power of transfer—Allocation of business and transfer—Difference between.

It is no doubt true that section 4 (*a*) of the Madras Civil Courts Act empowers the Principal Subordinate Judge to make arrangements from time to time for distribution of the business of the Court among the various judges thereof. This is only an administrative power of allocating business of Court to particular judges. This does not empower a subordinate judge to transfer or re-transfer a

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* C.R.P. No. 475 of 1963. 25th January, 1965.

1. (1948) 2 M.L.J. 368.
2. (1915) I.L.R. 39 Mad. 583.
3. (1921) I.L.R. 51 Mad. 672 : 55 M.L.J. 274.
4. (1933) 64 M.L.J. 431.

suit distributed to another judge of which that Court has taken cognizance. There is a clear distinction between orders of transfer and administrative orders allocating business to Courts of particular judges. When once a judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer. Section 4 (a) of Act III of 1873 does not empower a Principal Subordinate Judge to make a transfer. The only provision for transfer is under section 24 of the Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Salem, dated 13th March, 1963 and made in I.A. No. 296 of 1963 in O.S. No. 141 of 1962.

V. V. Raghavan, for Petitioners.

T. S. Krishnamoorthy Iyer, for 1st Respondent.

The Court made the following

ORDER.—The revision proceeding is upon a short point, and the facts themselves are not in dispute. The revision petitioners are sons of defendants 1 to 3 in O.S. No. 141 of 1962 on the file of the Principal Subordinate Judge, Salem, and defendants 1 to 3 executed a mortgage in favour of the Indian Bank, which filed a separate suit O.S. No. 24 of 1962, for recovery of the mortgage amount. The defence by the sons in that suit was that the mortgage debt was *avyavaharika* in character, was not binding on them, and was not for legal necessity. The suit O.S. No. 141 of 1962, was instituted by a guarantor in respect of the mortage amount, upon whose guarantee also the claim by the Indian Bank has been filed. The guarantor claimed, in the present suit, that certain terms of the indemnity bond between these parties were not fulfilled, and hence, that the petitioners (sons of defendants 1 to 3) were bound to account. In this context of facts, the petitioners applied for withdrawal of O.S. No. 24 of 1962, the suit filed by the Indian Bank, from the Court of the Additional Subordinate Judge, to the Court of the Principal Subordinate Judge, for trial along with O.S. No. 141 of 1962, already pending in the latter Court. The learned Subordinate Judge dismissed this application, as according to him, there was no justification made out for ordering such a transfer.

The short point is whether the learned Principal Subordinate Judge could really make a transfer of that kind, of a suit pending before the learned Additional Subordinate Judge, once that suit had been allotted to the learned Additional Subordinate Judge and that Court was seized of the litigation and had taken judicial cognizance of the suit. The only power which could be invoked in favour of the petitioner is that embodied in section 4 (a) of the Madras Civil Courts Act III of 1873. The last paragraph of section 4 (a) states that the Principal Subordinate Judge,

"may, from time to time, make such arrangements as he thinks fit for the distribution of the business of the Court among the various Judges thereof".

This certainly enables the principal judicial officer to retain a suit for his own trial, or to distribute it to any of the other judicial officers of the same Court. But, in my view, it does not authorise him to make a re-transfer to his own file, of a suit already distributed to another Judge, of which that Court had taken cognizance. This point was dealt with by Beaumont, C.J., in *Shankarji Samalji* v. *Vrajlal Bapalal*[1], but with reference to section 24, Civil Procedure Code. The learned Chief Justice observed :

"In my opinion, there is a clear distinction between orders of transfer and administrative orders allocating business to Courts of particular Judges. When once a Judge has taken cognizance of a suit, any order removing the suit from his file is an order of transfer."

With respect, I agree with the principle of this decision, and hold that the learned Principal Subordinate Judge was correct in his view that section 4 (a) of Central Act III of 1873 could not empower him to make this transfer.

It seems to be true that there is one issue in common between the two suits. But, another reason why no transfer can now be ordered is that the Indian Bank, the plaintiff in the other suit, is not before Court, and is not a party to the Revision

1. A.I.R. 1935 Bom. 286.

proceedings. Hence, the proper remedy of the revision petitioners is to institute a petition under section 24, Civil Procedure Code, before the District Judge, Salem, for making a transfer which would secure the trial of both the suits by one of the two Judges. In this petition, notice will have to be given to the Indian Bank; and that party will have to be heard; after that, in the light of the admitted fact that one issue is common to the suits, the learned District Judge may dispose of the matter according to law. With these observations, the Revision is dismissed.

There will be no order as to costs.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

R. M. Ramanathan Chettiar .. *Petitioner**

v.

M. RM. S. Chockalingham Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), section 73—Rateable distribution—When could be claimed—Application for transfer of decree for execution—If an application for execution.

In order to claim rateable distribution under section 73 of the Code of Civil Procedure a person should have applied to the Court in which the assets are held before the receipt of such assets. The mere fact that an application has been made for transfer of a decree for execution to the Court concerned, *viz.*, the Court in which the assets came to be held, cannot mean that application in execution has been made to that Court within the meaning of section 73 of the Code. There is an obvious difference between the application for transfer and an application for execution.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Devakottai dated 18th December, 1961 and made in E.A. No. 283 of 1961 in E.P. No. 93 of 1961 in O.S. No. 2847 of 1960, City Civil Court, Madras.

N. C. Raghavachari, for Petitioner.

V. V. Raghavan, for Respondent.

The Court made the following

ORDER.—This Revision Petition arises out of an application filed by the petitioner under section 73, Civil Procedure Code for rateable distribution. He filed O.S. No. 2347 of 1960 on the file of the City Civil Court, Madras, and obtained a decree on 22nd December, 1960 for a sum of Rs. 25,000. During the pendency of the suit, he applied for an order of attachment before judgment and the interim order was made absolute on 20th December, 1960. The petitioner filed an application on 28th March, 1961 for transfer of this decree to the Sub-Court, Devakottai, for execution, as the properties which were attached before judgment by the petitioner were situate within the territorial jurisdiction of the Sub-Court at Devakottai. His application for transfer was ordered on 1st April, 1961 by the City Civil Court and on the same day the decree-holder had applied for execution of the decree in the Devakottai Court.

The respondent here who obtained a decree against the judgment-debtor in O.S. No. 206 of 1960 brought the property to sale in E.P. No. 488 of 1960, District Munsif's Court, Devakottai. The sale was held on 20th March, 1961 and on 30th March, 1961 the purchaser deposited the balance of the sale proceeds deducting what he had already paid on the date of the sale. The application for rateable distribution was filed by the petitioner making the respondent alone a party.

Learned Counsel for the respondent states that there are other decree-holders to whom also a portion of the sale proceeds had been distributed and that the petitioner should have impleaded them also as parties to the application, and that the petition should have been rejected for non-joinder of those decree-holders. I see considerable force in this argument; but as I am disposing of this Revision Petition on a more fundamental point, I do not think it is necessary to express my final opinion.

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* C.R.P. No. 1144 of 1962. 29th January, 1965.

On behalf of the respondent it is objected that the petitioner is not entitled to rateable distribution, as the petitioner, on his own showing, has not satisfied the conditions of section 73, Civil Procedure Code to entitle him to a share in the sale proceeds.

Under section 73, Civil Procedure Code, the petitioner must have applied to the Court in which the assets are held in this case, District Munsif's Court, Devakottai, before the receipt of such assets, *i.e.*, 30th March, 1961. Admittedly, no such application for execution had been filed by the petitioner. Learned Counsel for the petitioner urges that the application for transfer, which he filed in the City Civil Court, Madras, on 28th March, 1961, should be regarded as an application for execution and that when the decree had been transferred, he must in law be deemed to have applied for execution even in the transferee Court. It is impossible to accept this contention. There is obvious difference between an application for transfer and an application for execution. An application for transfer need not be in the form of an application for execution and it is only after the transfer is ordered that the decree-holder has to apply for execution complying with the provisions of Order 21, Civil Procedure Code. The application for transfer is merely a step-in-aid and surely not an application for execution. The result, therefore, is that the petitioner not having applied for execution in the District Munsif's Court, Devakottai, before the receipt of the assets, is not entitled to claim rateable distribution. The Revision Petition fails and is dismissed.

No costs.

R.M. —— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

V. Lakshmana Konar and another .. *Petitioners**.

v.

Lakshmana Chettiar .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 35 and Madras Buildings Lease and Rent Control Act (XVIII of 1960)—Decree for specific performance of contract of sale and delivery of possession—Scope of delivery that could be effected—Tenants in possession—When could claim protection.

Order 21, rule 35 of the Civil Procedure Code prescribes the procedure to be adopted in giving symbolic possession to a decree-holder where the property sought to be delivered possession of in execution of a decree is in the possession of a tenant or other person entitled to occupy the same and not bound by the decree. But in cases where the tenants were inducted into the property after the decree they cannot claim any right as they will be persons bound by the decree. Even in cases, where such tenants come in after the institution of the suit, their rights if any may be affected by the doctrine of *lis pendens*. The position will be different only in cases where the persons claim the protection of statutes like the Rent Control Act as tenants in occupation even prior to the institution of the suit.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Madurai dated 15th January, 1965 and made in E.A. No. 410 of 1964 in E.P. No. 94 of 1964 in O.S. No. 22 of 1958.

P. V. Subramaniam, for Petitioner.

The Court made the following

ORDER.—This Revision Petition under section 115 of the Civil Procedure Code has been filed under the following circumstances. One Lakshmanan Chettiar obtained a decree in O.S. No. 22 of 1958 on the file of the Subordinate Judge of Madurai, for specific performance of a contract of sale and for recovery of possession of the property involved from the vendor Muthuswamy Chettiar, the defendant in that suit. This decree was obtained on 11th December, 1958. In execution of this decree, after obtaining the sale deed, the decree-holder filed an execution petition for taking possession. He was then resisted by two persons, Lakshmana Konar and Kesavan (petitioners herein). He filed E.A. No. 410 of 1964 in E.P. No. 94

* C.R.P. No. 205 of 1965. 15th February 1965.

of 1964 for removal of the obstruction caused. It is common ground that Lakshmana Konar and Kesavan were inducted as tenants into the property (a house in Madurai) by the judgment-debtor Muthuswamy Chettiar after the decree. Lakshmana Konar and Kesavan contended that they had acquired rights under the Madras Buildings (Lease and Rent Control) Act, 1949, later 1960, and that they were not liable to be evicted so long as they paid the rent, etc. The learned Subordinate Judge rejected this contention pointing out that since they had been inducted as tenants after the decree and there was no relationship of landlord and tenants between the decree-holder and them, they could not claim the benefits of the said Acts. He directed delivery. This petition has been filed against that order.

The matter is governed by Order 21, rule 35, Civil Procedure Code which says that where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, and, if necessary, by removing any person bound by the decree who refused to vacate the property. Order 21, rule 36, Civil Procedure Code prescribes the procedure where the immovable property sought to be delivered is in the possession of a tenant or other persons entitled to occupy the same, and not bound by the decree ; in such a case, only what is called 'symbolical possession' can be given to the decree-holder. The question, therefore, is whether the petitioners herein are persons bound by the said decree.

The answer can only be in the affirmative, because, the petitioners were inducted into the property only after the decree, that is, after the rights arose to the decree-holder under the decree. Those rights cannot be prejudiced by anything done by the judgment-debtor after that date. If the petitioners had been inducted as tenants before the date of the decree, possibly they could have set up their rights under the Madras Buildings (Lease and Rent Control) Act, though, even there, a further question might arise whether, to claim the benefits of the Act, they should have been inducted as tenants before the institution of the suit for specific performance, and it might be argued that on the doctrine of *lis pendens*, any act of the defendant-vendor inducting the tenants after the institution of the suit would not affect the decree-holder. But, whatever the position on that may be, it is clear that where, as in this case, a judgment-debtor inducted the tenants after the date of the decree, those persons also would be bound by the decree. To hold otherwise would be to stultify and defeat the decree.

The decision of the Calcutta High Court in *Yusuf* v. *Jyotishchandra Banerji*[1], and even the decision brought to my notice in fairness by Sri P. V. Subrahmanyam, learned Counsel for the petitioner, namely, *Jayagopal* v. *Deviram*[2], confirms the view which I have expressed above. Reference may also be made to a decision of mine in *Ayyanan* v. *Pechi*[3], wherein I have referred to some other decisions also.

Learned Counsel for the petitioners has not been able to cite any decision which will invalidate the view expressed above. The decision in *Subbaraju* v. *Seetharamaraju*[4], does not deal with this question. It merely lays down the right of an agriculturist-judgment-debtor to lease out a land for a period not exceeding one year, even during the pendency of the suit for possession of the property. The decision says that this is an ordinary act which can be done by the judgment-debtor and can not be affected by the doctrine of *lis pendens*. But only to that extent the decision will apply. But, here the petitioners seek to set up permanent rights of tenancy under the Rent Control Act. This claim cannot receive any support from the decision cited.

The decision in *Kanso Devi* v. *Kishan Chand*[5] cited by the learned Counsel for the petitioners is again distinguishable on the ground that Brij Lal, the person concerned there, had been inducted as a tenant even prior to the institution of the pre-emption suit, and, therefore, had statutory rights of tenancy under the East

1. (1932) I.L.R. 59 Cal. 739.
2. A.I.R. 1957 M.B. 99.
3. (1964) 1 M.L.J. 274.
4. (1915) I.L.R. 39 Mad. 283.
5. A.I.R. 1963 Punj. 229.

Punjab Rent Restriction Act, corresponding to our Madras Buildings (Lease and Rent Control) Acts, 1949 and 1960. It was subject to those rights that the pre-emptor had to take.

Accordingly, this Petition is dismissed.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

A. N. Parasurama Ayyar and two others .. *Petitioners**

v.

The Chief Rent Controller, Court of the Rent Controller, Mount Road, Madras and others .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 4—Madras Buildings (Lease and Rent Control) Rules, 1961, rules 8 to 14—Scope—If ultra vires—Rules, if not in conformity with the provisions of section 4 (2)—"Cost" and "Total cost"—Meaning of—If means original cost or market value—Classification in Schedule II fixing rates of depreciation—If unrelated to classification in Schedule I and bad on that account.

The rules relating to fixation of fair rent for residential and non-residential buildings (rules 8 to 14) framed under section 4 (2) of the Madras Buildings (Lease and Rent Control) Act, 1960 cannot be held to be *ultra vires* as not being in conformity with the provisions of section 4 (2) of the Act in the sense that they do not carry out their purpose.

Though "cost" in the context of "cost of construction" in section 4 (2) (*b*) (i) may normally mean the original amount expended for construction of a building, and may not be the same thing as the market value, the word "cost" is not used in that sense in section 4 (2). The "total cost" combines both the cost of construction and the market value of the portion of the site on which the building is constructed. The phrase "total cost" in section 4 (2) (*a*) includes the market value of the land as contemplated by clause (*b*) and this shows that by "total cost" is not meant the original cost of the building. The statutory sense in which the word "cost" or the expression "total cost" is used in section 4 (2) (*a*) is not the original cost or the original expenditure incurred for the construction of the building.

"Total cost" in section 4 (2) is a composite concept consisting of the three components mentioned out of which the cost of construction for the purpose of arriving at the total cost is to be calculated according to the rates prescribed for each class of buildings prescribed and not the initial expenditure incurred in the construction. The mode of depreciation prescribed is no doubt a reverse process, but there is nothing strange in such a manner of arriving at the cost of construction. It is an accepted method and is known as the contractors' method. The rules follow the pattern of the contractor's mode of valuation but with this qualification that instead of proceeding upon the basis of the present cost of reproduction of a building similar to the one for which fair rent is to be fixed, the rules direct that the cost of construction should be computed at the rates prescribed with reference to each prescribed class of buildings and the rates prescribed by the rules apparently were those obtaining at the time when the Act came into force, *i.e.*, 30th September, 1960. The rules are in conformity with section 4 (2) and are valid. It cannot also be said that the classification in Schedule II in which the rates of depreciation are fixed at so much per cent. per annum in respect of the four types of buildings described therein, is not related to the classification in Schedule I.

Hari Chand v. *Secretary of State*, L.R. 66 I.A. 258 : (1939) 2 M.L.J. 722 ; *Ethirajulu Naidu* v. *Ranganathan Chetty*, (1941) 2 M.L.J. 711 ; *Secretary of State* v. *Sri Narain Khanna*, (1942) 2 M.L.J. 289 : L.R. 69 I.A. 93, applied.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavits filed therewith, the High Court will be pleased to issue a Writ of Prohibition, prohibiting the first respondent in each of the petitions from proceeding with the enquiry of H.R.C. No. 5088 of 1963, H.R.C. No. 1372 of 1963 and R.O.O.P. No. 352 of 1963 respectively.

M. K. Nambiar for *K. K. Venugopal* and *A. P. Venkatachalam*, for Petitioner in W.P. Nos. 220 and 221 of 1964.

K. Radhakrishnan, for Petitioner in W.P. No. 321 of 1964.

K. Venkatasami for Additional Government Pleader on behalf of 1st Respondent in W.P. Nos. 220 and 221 of 1964 and on behalf of Respondents 1 and 3 in W.P. No. 321 of 1964 and for 5th and 8th Respondents in W.P. Nos. 220 and 221 of 1964.

*W.P. Nos. 220, 221 and 321 of 1964. 3rd September, 1964.

V. K. Thiruvenkatachari for *B. Lakshminarayana Reddi* and *V. Lakshmipathy*, for Respondents 2 to 4 in W.P. No. 220 of 1964.

. *Jayakumar*, for Respondents 2 to 7 in W.P. No. 221 of 1964.

V. Seshadri, for 2nd Respondent in W.P. No. 321 of 1964.

The Court made the following

ORDER.—These petitions for prohibition challenge the *vires* of the Madras Buildings (Lease and Rent Control) Rules, 1961, relating to fixation of fair rent for residential and non-residential buildings under section 4 of the Madras Buildings (Lease and Rent Control) Act, 1960. The petitioners are different tenants and some of the respondents are their respective landlords. The State of Madras has been impleaded as one of the respondents, as the validity of the Rules is questioned. The landlords filed before the Rent Controller at Madras or Coimbatore as the case may be, who is the 1st respondent in each of the petitions, petitions for fixation of fair rent. In W. P. No. 220 of 1964 the petitioner is in occupation of 24, Halls Road, Egmore, paying a monthly rent of Rs. 375. He is running the Minerva Tutorial College and the Minerva Publishing House in the premises which are treated as non-residential for purposes of the Act. Petitioners before the 1st respondent, who are the landlords, prayed for fixing the fair rent of the premises at Rs. 2,584-40 per mensem which they purported to have arrived at on the basis of the Rules framed under section 4 of the Act. It is stated that the plinth area of the whole building is 9 grounds 1,807 sq. feet and the age of the building 50 years. They have classified the building in their petition for fixation of fair rent as Class II and Class III for the purpose of the Rules. By application of the Rules, they arrived at, as they claimed, the total cost of construction at Rs. 2,32,901 and after deducting depreciation of Rs. 91,955-11 gave the net value at Rs. 1,40,905-89. To this figure they added Rs. 1,46,250 as the market value of the site and Rs. 57,431-17 referable to the increase on account of amenities at 20 per cent. On that basis, the annual rent was calculated at Rs. 31,012-33 and monthly rent at Rs. 2,584-40. W.P. No. 321 of 1964 relates to premises No. 84, Krishnaswamy Mudaliar Street, Coimbatore, for which a monthly rent of Rs. 287-50 is paid. This is stated to be a residential building and to have been constructed in 1941. In the Fair Rent Petition the landlord claimed Rs. 1,200 per mensem as fair rent on the basis of the Rules. In W.P. No. 221 of 1964, which is concerned with the premises No. 2/157, Purasawalkam High Road, Madras, the landlord in the Fair Rent Petition claimed Rs. 2,575 as fair rent per month against Rs. 187-50 now paid as monthly rent. The tenant is a practising surgeon and is running a nursing home in the premises which must therefore be classified as a non-residential building. The tenants in the petitions before this Court pray for rules prohibiting the Rent Controllers, concerned from proceeding with the petitions for fixation of fair rent, their ground being that the Rules, framed by the State Government, in exercise of the powers vested in them by section 4 of the Act, are not in conformity with its intention and ambit and are, therefore, invalid.

The Madras Buildings (Lease and Rent Control) Act, 1960, repealed the Madras Buildings (Lease and Rent Control) Act, 1949, and re-enacted, amended and consolidated the law relating to the regulation of the letting of residential and non-residential buildings and the control of rents of such buildings and the prevention of unreasonable eviction of tenants therefrom in the State of Madras. Section 4 of the earlier Act provided for fixation of fair rent by the Controller on application by the tenant or landlord of a building and fixed the principles on which fair rent should be arrived at. The fair rent should be fixed having due regard, *inter alias*, to the prevailing rates of rent in the locality for the same or similar accommodation in similar circumstances during the twelve months prior to 1st April, 1940 and to the rental value as entered in the property tax assessment book of the Municipal Council or the Corporation of Madras, as the case may be, relating to the said period and by allowing an increase at a certain percentage over such rate of rent or rental value. The percentage of increase varied with two slabs of the quantum of such rate of rent or rental value and was, in the case of non-residential

buildings, fixed at slightly higher figures. This basis of calculating fair rent has been entirely given up and a new mode of fixing it up is prescribed by section 4 of the new Act. Sub-section (1) of that section provides that the Controller shall, on application by a tenant or a landlord of a building and after holding an enquiry, fix the fair rent for the building in accordance with the principles set out in sub-sections (2) and (3), as the case may be, and such other principles as may be prescribed. Sub-section (2) is as follows :—

"(2) (a) The fair rent for any residential building shall be at six per cent. gross return per annum on the total cost of such building.

(b) The total cost referred to in clause (a) shall consist of—

(i) the cost of the construction as calculated according to such rates for such classes of residential buildings as may be prescribed less the depreciation at such rates as may be prescribed ;

(ii) the market value of that portion of the site on which the residential building is constructed; and shall include such allowances as may be made for considerations of locality in which the residential building is situated, features of architectural interest, accessibility to market, dispensary or hospital, nearness to the railway station or educational institution and such other amenities as may be prescribed:

Provided that such allowances shall not exceed ten per cent. of the cost of construction as calculated in the manner specified in sub-clause (i)."

Sub-section (3) refers to fixation of fair rent for non-residential buildings and runs practically on the same lines as sub-section (2) except for the fact that the fair rent for non-residential building shall be at nine per cent. gross return per annum on the total cost of such building. Under sub-section (2) a landlord in respect of a residential building is entitled to a gross annual return by way of fair rent at 6 per cent. on the total cost of such building. How the total cost is to be arrived at is mentioned in the sub-section. The total cost shall comprise the cost of construction less the depreciation plus the market value of the portion of the site on which the residential building is constructed and shall include allowances for amenities subject to a maximum of 10 per cent. of the cost of the construction. The cost of construction has to be calculated according to the prescribed rates relevant to the prescribed classes of residential buildings and by deducting from it, the depreciation calculated at such rates as may be prescribed. The fixation of rates for, and of classes of, residential buildings as well as the rates of depreciation is thus left to the rule-making power. In exercise of that power, rules have been made of which rule 8 classifies residential buildings into four different classes depending upon the specifications and the materials used in the construction thereof as specified in Schedule I. Rule 9 fixes the rate for each class and floor at so many rupees per square foot of plinth area. Rule 10 sets out the various amenities for which allowances subject to a maximum may be given. Rules 11 to 13 relate to classification of non-residential buildings, calculation of the cost of the construction of such buildings and allowances to be made for the amenities specified. Rule 14 says that the depreciation of the buildings shall be calculated at the rates specified in Schedule II. For Class I of residential buildings, the cost of construction is prescribed at Rs. 16 per square foot of plinth area for the ground floor ; Rs. 13 for the first floor and Rs. 12 for the second floor; for Class II ground floor at Rs. 13, first floor at Rs. 10 and second floor at Rs. 9; for Class III, single storeyed at Rs. 10 and Class IV also single-storeyed at Rs. 5 per square foot of plinth area. Rule 9 has two *Explanations* and from the first it appears that in the case of Class I and Class II buildings, for every additional floor higher up, the rate per square foot shall be one rupee less than the rate per square foot for the floor immediately below and an additional rate of Rs. 2 per square foot of the floor area shall be allowed for the portion where mosaic flooring with skirting is provided. This *Explanation* also requires that the cost of construction shall include the cost of installation of cup-boards, lofts, racks, sanitary fittings in bath-rooms, distempering or emulsion painting in drawing rooms, first-class electrical installations excluding tube-lights and fans. Schedule I shows that the four-fold classification of residential buildings is based on the specifications for, and type and quality of, materials used in the construction. For instance for Class I buildings the foundations should be three to five feet below ground level with 1 foot 6 inches thick concrete and bricks footings above of sufficient thickness ; brickwork in cement mortar of suitable proportion,

For basement, the specification is brickwork in cement mortars and filling or earth filling in layers of 6 inches thick and well watered and rammed, usually about 2 feet 6 inches to 3 feet above ground level. Doors and windows for Class I buildings should be of first class teakwood frames and shutters with first class brass or aluminium or chromium fixtures with wind ties with ornamental grills or iron bars. Lintels and roofing to be of R.C.C. lintels and R.C.C. slab either one way or two-way reinforced with suitable bearings or Madras terraced roofing with first class teakwood joists ; flooring with 4 inches thick base of lime or cement concrete of certain proportions; weather proofing according to "Madras Detailed Standard Specifications" with brick concrete and two courses of flat tiles, plastering with cement mortar of suitable proportions, interior and exterior facets ; finish with colour wash, white-wash and distemper ; painting doors and windows and woodwork with 3 coats of first-class paint or varnish and sanitation with minimum water-closets, basins, etc., in bath. Different specifications and qualities of materials are specified for buildings specified for each of the other three classes of buildings. Class II buildings contemplated was of lime mortar or cement mortar for foundation and basement ; and best seasoned country wood frames and shutters with ordinary tower bolts ; eye-hooks and bolts with iron bars. For Class III buildings country bricks should be used with clay or cement mortar and for plastering, cement mortar or lime mortar ; country wood is used for doors and windows in buildings of Classes III and IV. Schedule II prescribes the standard rate of depreciation and for this purpose classifies buildings into four types and for each type a specific rate of depreciation at a certain percentage per annum is fixed. The first type is a building built in lime mortar in which teak has been used throughout. The rate of depreciation per annum allowed for this type is 1 per cent. 1½ per cent. is allowed for the second type of building built partly of brick in lime mortar and partly of brick in mud and in which teak has been used. Two per cent. is allowed for the buildings built in brick in mud and in which country wood has been used ; 4 per cent. for the fourth type of buildings which are inferior to the third type with brick in mud unplastered walls and mud floors and in which cheap country wood has been used. The depreciation in accordance with the note to the Schedule shall be calculated for each year on the net value arrived at after deducting the amount of depreciation for the previous year and the amount of depreciation shall in no case be less than 10 per cent. of the estimated present cost of building. The Schedule explains that the actual depreciation of a building aged "*n*" years is calculated by using the formula :

$P = \frac{A\ (100) - r)n}{100}$; where A = present capital cost of the building ; R = rate of depreciation per annum ; *n* = age of the building (*i.e.* the number of year) and P = the final depreciated value of the building. The amount of depreciation will be equal to 'A' — 'P' subject to a minimum of 10 per cent. of 'A'.

Mr. M. K. Nambiar for one of the petitioners contends that the expression "cost of building" or "cost of construction" in sub-sections (2) and (3) of section 4 means the original cost of construction and the intention is to deduct depreciation at the prescribed rate from such original cost and this meaning is made clear by the fact that sub-section (2) itself takes the market value of the portion of the site on which the building is constructed in contra-distinction with the cost of construction. He says that the cost of construction is not the same as the market value of the land. Further, according to him, when the section says "less the depreciation at such rates as may be prescribed," fixation of rates of depreciation has to be in relation to the classification of the residential buildings for fixing rates in the calculation of the cost of construction. But the Rules framed, under section 4 (2) provide for calculation of the cost of the construction not on the basis of the original cost of construction in the sense of the original expenditure incurred for constructing the building and deducting subsequent depreciation therefrom, but on the basis of certain artificial rates at so much per square foot of plinth area for each class of buildings apparently obtaining at the time when the Act came into force, namely 30th September, 1960, and deducting depreciation from the current year backwards.

For purposes of fixing the rates of depreciation, the classification of the types of buildings is not also related to the classification of buildings for the purpose of fixing rates for calculating the cost of construction. Mr. Nambiar, therefore, argues that the Rules framed are not in conformity with the provisions of section 4 (2) and do not carry out their purpose and are *ultra vires* section 4 (2). On the other hand, the contention of Mr. V. K. Thiruvenkatachari for the landlords-respondents is this. The total cost in section 4 (2) is a term of art and contains three components: (1) cost of construction, (2) market value of the portion of the site and (3) allowances for amenities subject to the prescribed maximum. The meaning of the total cost in the section, understood in the light of its components, does not mean either the original cost of the building or its present market value. He would say, therefore, that the Rules are entirely in conformity with section 4 (2). It may be granted that "cost" in the context of "cost of construction" may normally mean the original amount expended for construction of a building and is not the same thing as market value. Black's Law Dictionary defines cost as the amount originally expended in performing a particular act or operation or for production or construction, as of a building, and value as saleable value, actual value, market value, fair value, reasonable value. But is the word "cost" used in section 4 (2) in that sense? If clause (*a*) of sub-section (2) had stood by itself, total cost may perhaps have reference to the expenditure as a whole originally incurred in constructing the building.. But the sub-section indicates how the total cost should be calculated. The total cost combines both the cost of construction and the market value of the portion of the site on which the building is constructed and also includes the allowances for amenities. The cost of construction is to be calculated according to the rates prescribed for each of the classes of buildings, residential or non-residential. If by the cost of construction what is meant is the original expenditure incurred for the construction, it cannot be calculated according to the rates to be prescribed with reference to the prescribed classes of buildings. That clearly shows that Mr. Nambiar's contention that cost in section 4 (2) means the original cost of construction, cannot be accepted. The phrase "total cost" in section 4 (2) (*a*) includes the market value of the land as contemplated by clause (*b*) and this again shows that by total cost is not meant the original cost of the building. Inclusion of allowances in the original cost of buildings is also a further indication against Mr. Nambiar's contention. In my view, the statutory sense in which the word "cost" or the phrase "total cost" is used in sub-section (2) (*a*) is not the original cost or the original expenditure incurred for the construction of the building. "Total cost" in section 4 (2) is a composite concept consisting of the three components mentioned and out of which the cost of construction for the purpose of arriving at the total cost is to be calculated according to the rates prescribed for each class of building prescribed and not the initial expenditure incurred in the construction.

Normally, the notion of depreciation is a subsequent fall in value or reduction of worth due to deterioration arising from age, use and other causes and it is deducted from the last value of the building as reduced by previous depreciation. But the depreciation calculated at the prescribed rates is under section 4 (2) (*b*) to be deducted from the cost of the construction as calculated according to the rates prescribed. When the cost of construction is arrived at on such basis, the depreciation at the prescribed rate is to be deducted therefrom backwards. This mode of deduction of depreciation is no doubt a reverse process. But there seems to be nothing strange in such a manner of arriving at the cost of construction which Lord Macmillan, accepted in *Hari Chand* v. *Secretary of State*[1] which is generally known as the contractors' method. That no doubt was a case of land acquisition concerned with the market value of the building. The land belonged to Government and certain individuals to whom the Government had granted the land had erected buildings on it. When the buildings were sought to be acquired, the question at issue between the parties was as to the mode of valuation of the buildings.

1. (1939) 2 M.L.J. 722 : L.R. 66 I.A. 258.

The Judicial Committee held at page 726:

"The subject to be valued being a building apart from the site, the principle of fixing value by ascertaining the cost of reproducing the building at the present time and then allowing for depreciation in consideration of the age of the building and for the cost of such repair as might be required apart from depreciation is quite a well-known and recognised method of valuing buildings for the purpose of compensation. That method was pursued here..............................

The buildings accordingly in their Lordships' view have been valued for the purpose of compensation on a perfectly admissible and perfectly legitimate principle, and that being so, there would appear to be no valid objection on this score to the awards that were made."

Ethirajulu Naidu v. *Ranganathan Chetty*[1], is not a case of land acquisition but a case of lease which contained a stipulation that the lessee must be paid the value of the building put up by him according to the market rate when the landlord resumed possession. In valuing the building, regard was had to the cost of reproducing the building from which depreciation was deducted with the cost of repairs. A Division Bench of this Court applied the principle of *Hari Chand* v. *Secretary of State*[2] and approved the method of valuation. The principle of such mode of valuation was again recognised and applied by the Privy Council in *Secretary of State* v. *Sri Narain Khanna*[3]. The Rules here under attack and relating to fixation of the cost of construction, as it seems to me, follow the pattern of the contractor's mode of valuation but with this qualification that the Rules, instead of proceeding upon the basis of the present cost of reproduction of a building similar to the one for which fair rent is to be fixed, direct that the cost of construction should be computed at the rates prescribed with reference to each prescribed class of buildings and the rates prescribed by the Rules apparently were those obtaining when the Act come into force on 30th September, 1960. I hold, therefore, that the total cost contemplated by section 4 (2) is not on the basis of the original cost of construction nor on the present market value of the building but on the rates prescribed for each prescribed class of buildings. On that view, the Rules for fixation of the cost of construction are in conformity with section 4 (2) of the Act and are valid and the contention of the petitioners to the contrary must fail.

The standard rates of depreciation are no doubt fixed in Schedule II at so much per cent per annum in respect of each of the four types of buildings described in the Schedule. Under section 4 (2) (*b*), (i), as I understand it, the rates of depreciation prescribed should be related to the classification of buildings prescribed for calculating the cost of construction. The argument for the petitioners is that the four-fold types of buildings in Schedule II are not related to the classification of buildings in Schedule I. Though the description of each type of building in Schedule II is brief, I am unable to hold that the classification in Schedule II is not related to the classification in Schedule I.

The petitions are dismissed but with no costs.

P.R.N. *Petitions dismissed.*

1. (1941) 2 M.L.J. 711.
2. (1939) 2 M.L.J. 722: L.R. 66 I.A. 258.
3. (1942) 2 M.L.J. 289 : L.R. 69 I.A. 93.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

The Mettupalayam Coonoor Service (P.) Ltd., Coimbatore .. *Petitioner* *

v.

Messrs. Farmer Motor Services (P.) Ltd., Coimbatore and two others .. *Respondents*

Motor Vehicles Act (IV of 1939), sections 57 (3), (4), (5), 43-A and 47—First notification regarding proposal for variation of route under section 43-A—Petitioner filing objections thereto—Rejection of the application for variation—Subsequent notification under section 57(3) of the proposal to vary—Petitioner not making any representations under section 57 (4)—Rejection of the application for variation—Tribunal on a revision petition directing the variation without any notice to the petitioner—Effect—Whether in the circumstances the Tribunal was bound to give notice to the petitioner.

While the representation made by the objector in the Full Bench case (*S.M. Transport* v. *Raman and Raman (Private) Limited*, (1961) 2 M.L.J. 127 : I.L.R. (1961) Mad. 110 (F.B.) at the stage of the first notification claiming to be under section 47 of the Motor Vehicles Act, and the fact that the objector was heard by the Tribunal, were held to be sufficient compliance for the purpose of holding the petitioner under Article 226 of the Constitution to be an aggrieved person, that is not the test for deciding whether such a person would be entitled to be heard under section 57 (5) of the Act, if he failed to make any representations pursuant to a notification under section 57 (3). The terms of section 57 (5) are clear and it is only the person who had made representations pursuant to the notification under section 57 (3) that would be entitled to be heard under section 57 (5). The question is not whether the action of the Tribunal in allowing an objector, who had made no representations, to be heard, would be legal. But the point is, whether where he had failed to do so, he could, as a matter of right, claim that he should have been heard. Unless he had such a right, it cannot be said that the Tribunal was bound to give the petitioner notice of the revision petition filed by the first respondent. In the instant case, the petitioner had no such right and therefore the Tribunal was not bound to give the petitioner notice of the revision petition. Further, in the circumstances there is no violation of any principle of natural justice.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of Certiorari calling for the records relating to the order of the State Transport Appellate Tribunal, Madras, in R.P, No. 75 of 1962 dated 26th September, 1962 and quash the same (Proceedings No. 50644/A-2/61 dated 24th March, 1962, R.T.A. Coimbatore)

G. Ramaswami, for Petitioner.

K. K. Venugopal, for 1st Respondent.

K. Venkataswami, for Additional Government Pleader on behalf of the Respondents 2 and 3.

The Court made the following

ORDER :—This petition is to quash the order of the 3rd respondent allowing a revision petition of the 1st respondent and directing the variation of the route from Mettupalayam to Kempanaickenpalayam, as Mettupalayam to Karamadai. The proposal to vary would appear to have been notified by the 2nd respondent but this was not under section 57 (3) of the Motor Vehicles Act but pursuant to a practice followed by the 2nd respondent, in view of certain directions of the State Government under section 43-A for reference by the 2nd respondent to the Transport Commissioner in matters of variation of routes. The petitioner filed his objections. After considering the application for variation and the objections of the petitioner, the 2nd respondent came to the conclusion that there was no real need for the variation and rejected the application. Thereafter, there was a notification under section 57 (3) of the proposal. This time the petitioner made no representations under section 57 (4). The 2nd respondent dismissed the application by making the following order :

"Applicant absent. The variation involves curtailment of terminal facilities at Mettupalayam, an important commercial centre. There is also no real need for this variation. The application for the grant of the variation is hence rejected."

*W.P. No. 384 of 1963. 21st September, 1964.

The Tribunal, on a revision petition filed by the 1st respondent, reversed the order and directed the variation.

The petitioner complains that it having been an objector in the initial proceedings on the first notification under section 47, the Tribunal's order cannot be sustained as it was made without any notice to it. It is argued that although the initial notification of the proposal was not under section 57(3), and there is nothing in section 47 (3) itself requiring such notification, and since, as a matter of fact, the petitioner had filed its objections, this is an important fact and should have been regarded as a sufficient compliance of section 57 (4). On that basis, it is contended that the Tribunal was bound to give notice to the petitioner of the revision filed by the 1st respondent. In support of this contention, reliance for the petitioner is made on *S. M. Transport* v. *Raman and Raman (P) Ltd.*[1]. That case was not directly concerned with this question. What was decided by the Full Bench was whether the petitioner under Article 226 of the Constitution was a person aggrieved in order that he might be competent to maintain the petition. There, there was first a notification of the proposal to vary, which was cancelled. Then again there was a proposal which was notified and then a further notification under section 57 (3). Pursuant to the second notification under section 47, the petitioner before this Court had filed his representations. He was also heard by the Tribunal in revision. Dealing with the question as to whether the petitioner in that case was a person aggrieved, this Court observed :

> "Even assuming that technically it was necessary for Raman and Raman to have made a representation at each stage with reference to each notification, there can be no doubt that substantially they did make a representation opposing the variation. This we think is the most material circumstance in deciding whether Raman and Raman could invoke the jurisdiction of this Court under Article 226. In our opinion, Raman and Raman were certainly persons aggrieved by the order of the Appellate Tribunal sought to be quashed. They had not only filed a representation after the notification under section 47, they were even allowed to put forward their view before the State Transport Appellate Tribunal. The fact that they were heard by the Appellate Tribunal itself shows that they were treated as persons aggrieved."

This decision does not, therefore, help the petitioner. The 1st respondent here does not object to the petition under Article 226 of the Constitution on the ground that the petitioner is not a person aggrieved and is therefore not entitled to maintain it.

But the petitioner argues that although the question is different, it is entitled to rely on the Full Bench judgment inasmuch as it held that the representations objecting to the variation at the stage of the notification under section 47 were substantial compliance with the requirements of section 57 (3). I am unable to accept this contention. I do not understand the Full Bench to have laid down that the proceedings notifying a proposal apart from section 57 (3) had any statutory basis. Nor do I understand the Full Bench to have ruled that if an objector to a variation had not made his representations as required by section 57 (4), he would, nevertheless, be entitled to be heard by the Tribunal. That was not the question the Full Bench had to decide. As a matter of fact, in that case the Tribunal had heard the petitioner before the High Court. While the representation made by the objector in that case at the stage of the first notification claiming to be under section 47 and the fact that the objector was heard by the Tribunal, were held to be sufficient compliance for the purpose of holding the petitioner under Article 226 of the Constitution to be an aggrieved person, that is not the test for deciding whether such a person would be entitled to be heard under section 57 (5), if he failed to make any representations pursuant to a notification under section 57 (3). That question directly was decided by the Supreme Court in C.A. No. 762 of 1963. It is true that case related to a permit and in the case of variation, there is no question of selection. Even so, the terms of section 57 (5) are clear and it is only the person who had made representations pursuant to the notification under section 57 (3) that would be entitled to be heard under section 57 (5). The question is not whether

1. (1961) 2 M.L.J. 127 : I.L.R. (1961) Mad. 110 (F.B.).

the action of the Tribunal in allowing an objector, who had made no representations, to be heard, would be legal. But the point, as I said, is whether where he had failed to do so, he could, as a matter of right, claim that he should have been heard. Unless he had such a right, it cannot be said that the Tribunal was bound to give the petitioner notice of the revision petition filed by the respondent.

Learned Counsel for the petitioner suggested that if a suit was dismissed, notwithstanding the absence of the defendant and there was an appeal by the plaintiff, the appellate Court was bound to give notice to the defendant before disposing of the appeal and that the principle of this analogy should be applied to the facts of this case. But the analogy suggested by learned Counsel is quite inappropriate. The proceedings under section 57 (3) can in no sense be equated to the facts in the illustration.

Lastly, it was contended for the petitioner that the principles of natural justice required that the petitioner having been an objector before the Regional Transport Authority at some stage, it should have been given notice by the Tribunal before allowing the revision petition. But natural justice is not an abstract rule but will take its pattern and colour from the relevant statute. If, under section 57 (5), the Tribunal was not bound to hear the petitioner and it was not entitled to be heard by the Tribunal as a matter of right, I do not see how any principle of natural justice is involved or violated.

The petition is dismissed but with no costs.

K.L.B. — *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. JUSTICE ANANTANARAYANAN AND MR. JUSTICE K. S. RAMAMURTI.

Veluchami Thevar .. *Appellant* *

Criminal trial—Sentence—Discretion of Court to award lesser penalty in case of murder—When to be exercised—Grave and sudden provocation as an extenuating circumstance—Confession of Unchastity obtained from wife by coercion and threat—If could be pleaded as a ground of sudden provocation for inflicting severe injuries on wife and Killing the alleged paramour.

It is no doubt true that there is a judicial discretion vested in a Sessions Judge to award a lesser sentence in a case of murder and the Criminal Procedure, as now amended, does not require reasons to be stated in that regard. But this does not mean that any special pleading or formal excuse should displace the judicial discretion. It is the duty of the Courts to award the extreme penalty of the law for the purpose of deterrence in all cases of murder, where the crime is deliberate and there are no extenuating features. That duty cannot be shirked merely because there is a discretion vested in Courts, and because it might be irksome to award the extreme penalty.

Where the evidence on record clearly showed that the husband tortured and ill-treated his wife and virtually coerced her to confess her alleged unchastity under threat of strangulation it cannot be contended that such sudden confession by the wife was the cause of a grave and sudden provocation for the husband to commit an offence which he did. It is a case of a man entertaining unworthy suspicions trying to find material somehow for proof of his suspicion.

Appeal against the Judgment of the Sessions Judge of the Court of Session of the Ramanathapuram Division at Madurai in case No. 149 of the Calendar 1963 dated 10th January, 1964.

T. S. Palanisivagurunathan, amicus curiae, appointed under Rule 242 of Criminal Rules of Practice and Orders, 1958, to argue the case.

The Public Prosecutor on behalf of the State.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This is an extraordinary case, and, though the facts have been established beyond any element of reasonable doubt, we are constrained to comment upon certain of the psychological aspects of this case, with regard to the matter of sentence. The appellant, Veluchami Thevar, married a certain Sundaravalli (P.W. 1) in October-November, 1962. Ravi (deceased) was a friend of the appellant, and was employed along with him ; he was a guest at the wedding.

*Cr.A. No. 43 of 1964. 8th April, 1964.

The record does not justify the slightest suspicion that Ravi (deceased) was really on terms of improper relationship with Sundaravalli (P.W. 1). Learned Counsel acting as *amicus curiae* has drawn our attention to the fact that Sundaravalli (P.W. 1) had been previously married and divorced. But the appellant was perfectly aware of this, and divorce was sanctioned by the social standards of the community to which these persons belonged.

Very unfortunately, the appellant entertained powerful suspicions about the fidelity of his wife (P.W. 1) in relation to Ravi (deceased). Thereafter, he seems to have behaved towards P.W. 1 in a manner that shows that he abandoned all standards of humanity, and even decency, with regard to his wife. On one occasion, P.W. 1 was branded on the right palm with a hot iron by the appellant; on another occasion, she was gagged by the appellant, and cut on the left cheek. Even under such circumstances, in response to demands of the appellant about her relationship with others, P.W. 1 maintained that she had no paramour, and that she was a chaste wife.

On the night of 26th August, 1963, the night of offence, the appellant behaved to P.W. 1 in a particularly revolting and sadistic manner. At about 11 P.M. he took her to a lonely place in a field, compelled her to stand naked, and then gave her blows with his leather belt on her back. Even under this most painful and humiliating ordeal, P.W. 1 seems to have maintained her verbal assurances about her chastity. Not content with this, the appellant took P.W. 1 back home, and wanted her to confess about a paramour on threat of strangulation. Afraid for her life, P.W. 1 made a confession that Ravi (deceased) was her paramour as the appellant had suspected. The case is a very clear instance of the psychological truth that a man who entertains unworthy suspicions will find material somehow for proof of his suspicions, though the suspicions themselves might be totally false. The appellant then took out a cloth, gagged the mouth of his wife with it, and cut off some of her hair on the head. He then cut her right ear with his knife, closed her nose with a towel and took a bigger knife and cut her right breast. After this, he changed his clothes and left the house taking the two knives at 2 A.M. The wife (P.W. 1) released herself and raised an alarm. Her evidence is corroborated by that of a neighbour P.W. 7, a retired Police Constable, who came in response to her cries. It is also corroborated by the Doctor who examined her, and found an abrasion on her right ear, an incised wound just about the right nipple of breast, and two other simple injuries.

It is after this that the appellant went to the tea hotel run by P.W. 8 where himself and Ravi (deceased) were employees. Apparently, the appellant was sure that Ravi (deceased) would be sleeping there. At about 2-45 A.M. the appellant came there and went to the lane or place north of the hotel where Ravi (deceased) and P.Ws. 2, 3 and 4 were resting. Ravi (deceased), according to his dying declaration (Exhibit P. 1) was not asleep but resting. The appellant then stabbed the deceased and ran. The deceased shouted that the appellant had stabbed him, staggered towards the shop and fell in front of it. P.Ws. 2 and 3 attended on Ravi (deceased). Learned Counsel for the appellant points out that night was dark and that P.Ws. 2 and 3 did not purport to say that they saw the appellant stabbing Ravi. There can be no doubt at all about this, in view of the dying declaration of the deceased (Exhibit P-1) which clearly states that the deceased was stabbed by the appellant. It is equally proved by the evidence of P.W. 4 that he saw the appellant running from there, and chased him for some distance in vain.

The subsequent facts are heavily against the appellant. At about 3-15 A.M. the appellant went and surrendered himself at Sivakasi Police Station before a Head-constable (P.W. 13) along with the two knives M.Os. 1 and 2. His statement has not been admitted in evidence, but his surrender with bloodstained weapons is a relevant piece of conduct admissible under the law of evidence, which is of the utmost significance. Not merely this. The appellant later made a voluntary confession to the Sub-Magistrate (P.W. 11) which was recorded as Exhibit P-8. In this statement, the appellant gives a long account of his marriage, admits that

he treated P.W 1 in a very cruel fashion, and then confesses that he went where Ravi (deceased) was sleeping, and stabbed him in the stomach.

We cannot conceive of a case in which the evidence could be more clear and conclusive. The autopsy conducted by P.W. 10 shows that the unfortunate Ravi who was, in all probability, quite innocent, had sustained very grave internal injuries because of this stab wound, to his right kidney and right ribs. In brief, he was stabbed to death with a single cruel blow. Under the circumstances, we are unable to see the slightest ground for doubting the propriety of the convictions under section 302, Indian Penal Code, for the murder of Ravi, and under sections 324 and 355, Indian Penal Code, in respect of the cruel treatment and injuries caused to P.W. 1. The convictions are accordingly confirmed.

With regard to the sentence, we are constrained to observe that the learned Sessions Judge has given no reason for imposing the lesser sentence, in paragraph 49 of his judgment, though in paragraph 45 he expresses the view that the appellant had the excuse that he was wounded in his tenderest feelings by his wife's ultimate confession. Unfortunately, the State has preferred no revision upon the matter of sentence and we hence feel most reluctant to interfere. But, in the interests of justice, we are constrained to point out that this is a case in which the extreme penalty of the law definitely appears to be called for. The learned Sessions Judge seems to have been of the view, judging from paragraphs 42, 43 and 44 of his judgment, where he discusses the question, whether the murder of Ravi could amount to a lesser offence, that the wife (P.W. 1) was perhaps of unchaste conduct, and that she perhaps had criminal intimacy with Ravi (deceased). We are totally unable to agree, and we have to point out that any such inference is quite against the probabilities. The learned Judge points to the sudden confession on the part of P.W. 1, which might have surprised the appellant and taken him off his balance. We are somewhat surprised at this line of reasoning. According to the unimpeachable evidence, the appellant tortured his wife in a very cruel and sadistic manner, and extorted a confession from her under threat of strangulation. We are totally unable to see how the slightest value of credence could be attached to a confession of a wife wrung from her under such circumstances, by a temporarily insane husband. On the contrary, the previous conduct of P.W. 1 in persisting in the affirmation of her chastity, notwithstanding the shameful and cruel treatment meted out to her by the husband (accused), compels us to conclude that P.W. 1 was in all probability, a very much wronged and innocent wife. The appellant seems to have worked himself up into a mood of insane suspicion and jealousy, and to have stabbed his friend, who perhaps did not betray him at all, deliberately, because he allowed this jealousy to cloud and darken his mind. The offence was deliberate, and shows signs of planning. It was very cruel, and we are unable to see any mitigating circumstances about it. We are making these observations because we wish to make it very clear for the guidance of Courts of trial, that while there is a judicial discretion vested in a Sessions Judge to award the lesser penalty in a case of murder, and the Criminal Procedure Code, as now amended, does not require reasons to be stated, this does not mean that any special pleading or formal excuse should displace such properly bestowed judicial discretion and thought. It is the duty of the Courts to award the extreme penalty of the law, for purposes of deterrence, in all cases of murder, where the crime is deliberate and there are no extenuating features. That duty cannot be shirked merely because there is a discretion vested in Courts, and because it might be irksome to award the extreme penalty. With these observations the sentences are also confirmed and the appeal is dismissed.

R.M. *Appeal dismissed; sentence confirmed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M. ANANTANARAYANAN AND MR. JUSTICE K.S. RAMAMURTI.

Abdul Mazid and another .. *Appellant* *

v.

I. M. Yacoub .. *Respondent.*

Pondicherry (Administration) Act (XLIX of 1962), sections 9 and 10—Jurisdiction of High Court at Madras under—Nature and scope of.

French Criminal Law—Property stolen within the French Territory and concealment in a foreign territory—Jurisdiction of French Courts to try the offence.

Under section 180 of the Code of Criminal Procedure a person accused of receiving or retaining stolen goods can be tried either by the Court within the local limits of whose jurisdiction the goods were stolen or by the Court within whose jurisdiction such goods were dishonestly received or retained. Under the French Law a person cannot be tried by Courts within the French Settlements for concealment of stolen property outside the territorial limits. Still where the articles are removed from French Territory by a stranger, which are or have been subject of theft in French territory, French tribunals will have jurisdiction to take cognizance of both the theft and the receipt of the stolen goods.

Under sections 9 and 10 of the Pondicherry (Administration) Act, 1962, the High Court at Madras is not merely clothed with the powers of cassation but is vested with a general appellate jurisdiction. Hence the High Court at Madras has all the powers of an ordinary Court of criminal jurisdiction in relation to an appeal from Pondicherry and can, in suitable cases, reduce the sentence in the interests of justice.

Appeal against the Judgment dated 17th October, 1963 of Tribunal *Superieur d' Appeal*, Pondicherry (Judgment dated 18th April, 1963 of Tribunal de Premiere Instance, Pondicherry).

N. Arunachalam, for Appellant.

A. Doraiswamy Iyengar, for Respondent.

The Public Prosecutor, for Pondicherry Territory.

The Judgment of the Court was delivered by

Anantanarayanan, J.—These are related criminal appeals, and we shall first deal with the Special Appeal by one Fazal Khan, (No. 823 of 1963) as that alone involves any problem in the disposal of the grounds of appeal. Briefly stated, the facts are that this Fazal Khan (Appellant), a resident of Mysore, and four others, of whom one Abdul Mazid, is the appellant in U.S.R. No. 15383 of 1963, from Jail, were tried together by the Courts at Pondicherry, with regard to alleged offences of house-breaking and theft, complicity in theft, receipt and retention of stolen articles, etc. The procedure followed was that of the Inquisitorial System recognised under the French Code of Criminal Instruction or Procedure, namely, there was an initial investigation by Judge of Instruction, who took cognisance of the information laid by the police, including the statements of the accused (Proces-Verbal), and this was followed by a commitment and a trial before the Court of First Instance. The convictions were under Articles 379, 401, 59 (Paragraph 11), 60, 460 and 365 of the Code Penal ; as far as Fazal Khan was concerned, he was sentenced to imprisonment for 4 years for the offences, to local banishment for 10 years and damages of Rs. 10,000. Abdul Mazid (Appellant in U.S.R. No. 15383 of 1963) was similarly convicted and sentenced. The *Tribunal Superieur d' Appeal* heard the appeals of the respective accused, and confirmed the convictions and sentences.

As we have earlier pointed out, the case of Fazal Khan involves certain special grounds, arising out of the fact that he was arrested by the Pondicherry Police at Mysore, and that the recovery of stolen articles from his house or his possession was at Mysore. It is not the case for the prosecution that Fazal Khan actually committed the offences of house-breaking and theft in Pondicherry limits, along with the other accused. The case is that he was an accomplice in the commission of those offences, by instigating the commission of the offences, and by providing a car

*S.A. (Crl.) Nos. 823 of 1963 (P) and 214 of 1964 (P) 24th March, 1964.
U.S.R. No. 15383 of 1963 (P)

subsequently for conveyance of the stolen properties from Bangalore. The case is also that he received and retained the stolen goods, with guilty knowledge.

Sri Arunachalam for the appellant (Fazal Khan) raises a preliminary ground of jurisdiction. According to his contention, the Pondicherry Courts had no jurisdiction to try his client, because the French Law is clear that a person cannot be tried in France or within the French Settlement for concealment of stolen properties outside the territorial jurisdiction. Reliance is placed upon a ruling of the *Tribunal Superieur d' Appeal* at Pondicherry of October, 1937, quoting a French Precedent to the effect that the French Courts were not competent to hear and determine cases of concealment committed in foreign territory, of the proceeds of a theft committed in France. But, there would appear to be two clear answers to this objection; we are hence constrained to hold that the Pondicherry Courts had jurisdiction in the present matter. First of all, the case against this appellant (Fazal Khan) was not merely that he concealed in foreign territory goods which were the subject of theft in French territory; had that been the only charge, the question of jurisdiction might conceivably have arisen. But the case against him was that he instigated the commission of the offences of house-breaking and theft at Pondicherry, though he was not bodily present, arranged for transport of stolen properties along part of the route to Mysore, and finally concealed the stolen goods or portion of those goods, in his house at Mysore. Sri Arunachalam stresses that, with regard to the alleged charge of instigation or complicity, the evidence is extremely weak, and that it consists merely of the statements of the co-accused. Even here, the statement is in general terms according to the *Proces-Verbal*, and not specifically to the effect that Fazal Khan (Appellant) asked the other accused to commit the crimes at Pondicherry. But, obviously, the question of jurisdiction is one matter, and the question of the adequacy or the acceptability of evidence is a totally distinct matter. Upon the charges, the Courts at Pondicherry had jurisdiction to try Fazal Khan for the offences with which he was charged. Another answer to the objection is that, in *Nouveau Repertoire* Dalloz, Volume III (1949 edition), under the heading *Recel* at pages 706/707, we find a definite statement of Jurisprudence to the effect that, when articles are removed from French territory, by a stranger, which are or have been the subject of theft in French territory, French Tribunals will have jurisdiction to take cognisance of both the theft and the receipt of stolen goods, and to try the concerned offenders. On the question of jurisdiction, we must hold that the French Courts were competent. As far as our own law is concerned, the matter is really beyond controversy, for, under *Illustration* (*b*) to section 180 of the Code of Criminal Procedure, a person can be tried on a charge of receiving or retaining stolen goods, either by the Court within the local limits of whose jurisdiction the goods were stolen, or by the Court within the local limits of whose jurisdiction the goods were dishonestly received or retained.

With regard to the propriety of the convictions, we are unable to find any ground for interference upon any aspect of, infirmity of law, or contravention of the principles of law accepted in the French Criminal Procedure. It is true that, had the law which prevails under our system of Criminal Jurisprudence been applicable, that part of the evidence relating to the complicity of this appellant in the crimes committed in Pondicherry, would be legally excluded. But, even so, we find clear evidence on the record with regard to the production by this appellant of part of the stolen goods (33 sarees) before Mr. Lingappa, Circle Inspector of Mysore City, when that Officer questioned the appellant and searched his house. Actually, we find from the documents made available to us that the appellant admitted this production, and, indisputably, the admissions were such as to lend every justification to an inference of receipt or retention of stolen goods with guilty knowledge. Hence, the propriety of at least the conviction upon this charge cannot be questioned. These facts could also be regarded as circumstantial evidence, in support of the charge of complicity in the theft itself, taken with other evidence which is admissible under the French Law, though, perhaps, not under our own. Consequently, we are unable to see any justification for interference with the propriety of the convictions of this appellant (Fazal Khan), and they will have to be sustained.

As regards the appellant from jail (Abdul Mazid), the case is far stronger, because the evidence against him relates to admissions of actual commission of the offence, along with others, including an admission of making a hole in the backdoor of the premises and obtaining entry, and also evidence relating to disposal of the stolen goods. The convictions of this appellant are confirmed.

We have very carefully considered the question of the sentences. Were we functioning purely as a Court of Cassation, we might have no jurisdiction to interfere with the sentences actually imposed, even if they appeared to us to be excessive or harsh. But under section 10 of the Pondicherry (Administration) Act, XLIX of 1962, we are not merely clothed with the powers of a Court of Cassation, but we have also the general jurisdiction which is enacted under section 9, and there is a specific exemption in the opening words of section 10 (1) to the effect that our powers are "without prejudice to the generality of the provisions of section 9". Therefore, we do have powers of ordinary criminal jurisdiction, in suitable cases, of course, to reduce the sentence in the interests of justice. In the present case, the minimum sentence that can be awarded as a sentence of imprisonment under the Penal Code is imprisonment for a term of one year. Taking all the circumstances of this case into account, we consider that, in the interests of justice, no heavier sentence than the minimum sentence need be imposed in the instance of Fazal Khan (Appellant) and Abdoul Mazid (Appellant from jail). Accordingly, we direct the reduction of the sentences of imprisonment of Fazal Khan to a period of one year in the case of Abdoul Mazid this will be the period already undergone by him, which is not less than the minimum. The sentences of local banishment under the French Law are confirmed, as well as the direction, both jointly and severally, to pay damages to the aggrieved party to the tune of Rs. 10,000.

R.M. ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Pichai Konar .. *Petitioner* *

v.

Chellayee .. *Respondent.*

Criminal Procedure Code (V of 1898), section 488 and Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946)—Mutual effect and scope of—Claim for separate maintenance solely on the ground that the husband has contracted a second marriage—If tenable.

Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946) and section 488, Criminal Procedure Code—Mutual effect—Invalidity of the second marriage—If a bar to claim maintenance.

It is no doubt true that under section 488 (1) of the Criminal Procedure Code a wife cannot claim separate maintenance merely on the ground that her husband has married a second wife as the mere fact of second marriage could not *ipso facto* establish neglect or refusal within the meaning of section 488 (1). But this does not preclude a Court from considering the fact of the husband's second marriage as a sufficient ground for the wife's refusal to live with him in deciding the question of neglect or refusal by the husband to maintain his wife.

The Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, provides that a Hindu married woman shall be entitled to separate residence and maintenance from her husband, if the husband marries again or keeps a concubine in the house or habitually resides with a concubine. Hence where a Hindu husband marries a second wife after the passing of the Act, the refusal by the first wife to live with her husband will be sufficient reason under section 488 (1) of the Criminal Procedure Code and if the husband fails to provide the first wife with separate residence and maintenance he will be guilty of neglect or refusal within the meaning of section 488 (1) of the Code. The fact that the second marriage may be void under the Hindu Marriage Act, 1955, does not affect her right as the question of sufficient cause under section 488 (1) does not depend on the validity or invalidity of the second marriage. Further, even if the second wife may not have the status of a wife still the husband's living with her will amount to his keeping a concubine or habitually residing with her within the meaning of the Act XIX of 1946.

* Cr.R.C. No. 655 of 1963. 17th March, 1964.
(Cr. R. P. No. 648 of 1963).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional First Class Magistrate, Devakottai in M.C. No. 284 of 1962.

V. Gopinathan, for Petitioner.

V. V. Radhakrishnan for the Public Prosecutor on behalf of State.

The Court made the following

ORDER.—This is a revision petition by the husband against the order of the Additional First Class Magistrate, Devakottai, granting the wife, the respondent, a maintenance of Rs. 30 a month. The facts admitted are that the petitioner married the respondent about 25 years ago, and they were living together for about 10 years. There was some misunderstanding between the petitioner and the respondent; the petitioner got separated from the respondent and married one Panchavarnam 7 or 8 years ago. There was a *Panchayat* to settle the difference between the petitioner and the respondent. It is the case of the petitioner that the respondent refused to live with him according to the decision of the *Panchayat*. The contention of the petitioner that the respondent was divorced, was not accepted by the trial Court. It is also not seriously disputed that the petitioner had married Panchavarnam as his second wife. It was suggested that, as the petition under section 488, Criminal Procedure Code, for maintenance was not filed by the respondent for a long number of years, it would indicate that the petitioner and the respondent were living separately by mutual agreement. Apart from the suggestion, there is no evidence to prove that the respondent, in any way, consented to waive her right to maintenance and live separately.

Mr. Gopinathan, the learned Counsel for the petitioner, submitted that the fact that the petitioner had married a second wife, is by itself not a sufficient ground for the wife refusing to live with him, and that, as the wife has refused to join him, he cannot be held guilty of neglect or refusal to maintain the respondent. The learned Counsel submitted that, under section 488 (3), Criminal Procedure Code, when an order under section 488 (1) is sought to be enforced, the Court may consider whether the refusal by the wife to live with the husband is reasonable. In construing that, it is provided that, if the husband has contracted marriage with another wife, or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him. The contention of the learned Counsel is that the Proviso is applicable only to section 488 (3) and not applicable to section 488 (1). The contention is probably right; but that would not preclude the trial Court from considering the fact of the husband's second marriage as sufficient ground for the wife's refusal to live with him in deciding the case of neglect or refusal by the husband to maintain the wife. Section 488 (4) provides that no wife shall be entitled to receive an allowance from her husband if she refuses to live with her husband without sufficient reason. The Hindu Married Women's Right to Separate Residence and Maintenance Act (XIX of 1946) provides that a Hindu married woman shall be entitled to separate residence and maintenance from her husband, if the husband marries again or keeps a concubine in the house or habitually resides with a concubine. Under this Act, the fact that a husband has married a second time, confers a right on the married woman to separate residence and maintenance. Therefore if the husband marries a second wife after the passing of the Act, the refusal by the first wife to live with her husband will be for sufficient reason under section 488 (4), Criminal Procedure Code, and if he fails to provide the first wife with separate residence and mainteance, he will be guilty of neglect or refusal to maintain her and will be liable under section 488 (1), Criminal Procedure Code.

It was faintly argued that the right conferred under Act XIX of 1946 cannot be availed of by the first wife, as the Hindu Marriage Act (XXV of 1955) prohibits marriage between two Hindus when either party has spouse living at the time of marriage. As the second marriage would be invalid, the contention is that the first wife will not be entitled to plead that the husband had married again. It is unnecessary to consider this question, as under Act XIX of 1946 the first wife is entitled to separate residence, if the husband keeps a concubine in the house or habitually resi-

des with a concubine. Even if the second wife is denied the status of the wife, it will amount to the husband keeping a concubine or habitually residing with her. This argument is unsustainable for another reason also. Under section 488 (4), Criminal Procedure Code, when the first wife refuses to live with her husband, whether he has married validly or not, she will be doing so for sufficient reason entailing the husband to maintain her under section 488, Criminal Procedure Code.

The learned Counsel relied on a decision of a Bench of the Calcutta High Court in *Sm. Bela Rani* v. *Bhupal Chandra*[1], where it was held that it would not be permissible to pray in aid the provisions of the Hindu Married Women's Right to Separate Residence and Maintenance Act for the purpose of construing sub-section (1) of section 488, Criminal Procedure Code. It was observed that the mere fact of a second marriage could not *ipso facto* establish such neglect or refusal within the meaning of sub-section (1) of section 488, Criminal Procedure Code. This decision is not in conformity with the view taken by this Court in *Bayanna* v. *Devamma*[2], where Govinda Menon, J., (as he then was) held that under section 2 of the Hindu Married Women's Rights to Separate Residence and Maintenance Act when the husband took a second wife, the first wife was entitled to live separately and claim separate maintenance and so her residing separate was legal, and that once she resided separately, the duty of the husband was to give her separate maintenance. This decision was referred to and followed by Sadasivam, J., in *Kandaswami Goundar* v. *Nachammal*[3]. The learned Judge did not follow the decision of the Calcutta High Court in *Sm. Bela Rani* v. *Bhupal Chandra*[1]. I am in respectful agreement with the view expressed in *Bayanna* v. *Devamma*[2], and *Kandaswami Goundar* v. *Nachammal*[3]. The contentions of the learned Counsel fail. Regarding the quantum of maintenance, I am unable to say that the amount is excessive.

The petition is dismissed.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

P. S. A. Susai and another .. .. *Petitioners**

v.

The Director of Fisheries, Mount Road, Madras and another .. *Respondents.*

Constitution of India (1950), *Article* 297—*Scope—Lands and other things underlying the ocean within the territorial waters of Indian Union—Vesting in the Union—Chank fisheries—Outside the ambit of Article* 297—*Chank fishery rights in the territorial waters of Sivaganga—Exclusive property of Native Rulers—Appropriation by Rulers from time immemorial—Exclusive rights of Rulers not affected by Fisheries Act* (*IV of* 1897)—*Act merely regulatory—Abolition of Sivaganga estate by Madras Estates* (*Abolition and Conversion into Ryotwari*) *Act* (*XXVI of* 1948)—*All rights vest in the State Government—Chank fisheries vest in the State—State has the power to lease out rights.*

Precedent—Decision rendered in ignorance or disregard of statute—No binding force.

Both in England and India, before the Constitution, a right to fish belonged *communis juris* to the subjects only in so far as it had not otherwise been appropriated by the Sovereign. The authorities make it clear that the Crown or some subject could acquire a property or ownership exclusive of the public right and in such a case, the exclusive right should prevail over the public.

So far as the chank fisheries along the sea coast of Southern India are concerned, there is ample authority both historical and judicial, to the effect that the Native Sovereigns throughout the ages, Pandiyas, Nayaks and Nawabs of Arcot and later the East India Company had regarded them as a fruitful source of revenue and held the fisheries of pearls and chanks as their exclusive property. They had either farmed out the right to fish the chanks and oysters in consideration of periodical payments on lease, or other arrangement or directly worked the chank and pearl fisheries.

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1. A.I.R. 1956 Cal. 134.
2. (1955) 2 M.L.J. 522.
3. 1963 M.W.N. (Crl.) 40.

*W.P. Nos. 915 of 196 of 1962. 24th September, 1962.

The indisputable historical evidence points out that from time immemorial, Native Rulers exclusively appropriated from and held the chank fishery right in the territorial waters of Ramanathapuram.

It is seen that at least from 1914 the Government had taken the chank fishery on lease from the Zamindar of Sivaganga.

When the last lease in favour of the Provincial Government was subsisting the estate of Sivaganga was notified on 7 September, 1949, under the provisions of Madras Act XXVI of 1948 and as a result, the Sivaganga estate including chank fishery vested in the Government absolutely on and from that date.

Sivaganga had originally formed part of the Zamindari of Ramanathapuram and, therefore, the observations of the Division Bench in *Annaswami Pillai* v. *Muthupeyal*, (1904) 14 M.L.J. 248: I.L.R. 27 Mad. 551 relating to the title of the Rajah of Ramanathapuram to the chank fisheries equally apply to the chank fisheries in the territorial waters of Sivaganga. Consequent upon the abolition of the estate of Sivaganga and its vesting in the Province of Madras, and now the State of Madras, it must be held, therefore, that the State Government is exclusively entitled to the chank fishery in the territorial waters of Sivaganga. It follows that the petitioners either as fishermen or members of the public have no common right to fish chanks in those waters and appropriate the same for themselves.

There is no doubt that in principle a decision rendered by even the highest judicial authority will have no binding force as a precedent if it was rendered in total ignorance or disregard of a relevant statute or statutory rule.

The provisions of the Indian Fisheries Act and the Rules framed thereunder, as amended in Madras entirely left untouched the exclusive rights of fishery, their incidence and exercise subject to limited regulation with the written consent of those entitled to such rights and conferred no rights upon the general public in derogation of such exclusive rights. The petitioners cannot, therefore, claim that either the Indian Fisheries Act or the Rules framed thereunder gave them or recognised in them as members of the public or fishermen, any right to dive or otherwise fish and catch chanks in the Sivaganga waters and appropriate the same for themselves.

Chank fisheries are not within the ambit of Article 297. What it vests in the Union is what underlies the ocean within the territorial waters of India and not the territorial waters themselves. For the purpose of the vesting under the Article, the dividing line appears to be between the bed of the ocean and the waters above it. What does not underlie the bed of the ocean is, clearly outside the purview of Article 297. Chanks cannot, in any sense, be regarded as underlying the bed of the sea but are fish gathered or taken not from underneath the bed but from the sea bed.

The chank fishery in the territorial waters of Sivaganga is not by virtue of Article 297 vested in the Union Government but continues to be the exclusive property of the State Government, and as its proprietor it is competent for it to grant the lease of the right to fish chanks in those waters and the petitioners have no common or other right to fish chanks in the waters or to question the lease.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith, the High Court will be pleased to issue a Writ of *mandamus* directing the 1st Respondent—the Director of Fisheries, 35/2, Mount Road, Madras-2, to forbear from taking further steps in respect of leasing of fisheries rights in Sivaganga fisheries extending from Sundarapandianpatnam to Karungadu in Ramanathapuram District, pursuant to the tender notice dated 17th March, 1962.

S. Mohan Kumaramangalam and *S. M. Casim*, for Petitioner in W.P. No. 915 of 1962.

M. K. Nambiyar and *T. Martin*, for Petitioner in W.P. No. 916 of 1962.

R. G. Rajan for the Additional Government Pleader on behalf of 1st Respondent in both petitions.

The Advocate-General (*V. K. Thiruvenkatachari*) and *S. K. L. Ratan*, for 2nd Respondent in W.P. No. 915 of 1962.

The Advocate-General (*V. K. Thiruvenkatachari*) for *K. C. Jacob*, *S. K. L. Ratan* and *J. Satyanarayana*, for 2nd Respondent in W.P. No. 916 of 1962.

The Court delivered the following

JUDGMENT.—These petitions relate to the Chank fishery in the territorial waters along the Sivaganga coast in Ramanathapuram district. These waters extend from Sundarapandianpatnam to Karungadu. The Director of Fisheries who is the first respondent called for tenders for the lease of chank fishery for a period of three years from 1st June, 1962, and by G.O. Ms. No. 2359, Food and Agriculture, dated 11th July, 1962 ; the State Government directed the grant of lease to the second respondent, his bid of Rs. 64,646 as the annual rent being the highest. His

tender was accordingly accepted by the first respondent by letter dated 12th July, 1962. Under the terms of the tender, the successful tenderer will be at liberty to collect chanks caught in nets and by means of diving as well within the limits specified. In the process of such collection of shells, no chanks of less than 2¼ inches in diameter should be fished and taken to the shore. Any chank under the limit of 2¼ inches in diameter, if brought inadvertently to the shore, all such undersized shells should be returned at once alive to the chank-beds at sea. All undersized shells in possession of the lessee are liable for forfeiture. Should there by any change in the size of fullsized and undersized chanks classification during the course of the lease, it shall be binding on the contractor. The lessee has no right over the Valampuri shell fished and it should be promptly handed over to the Assistant Director of Fisheries, Sivaganga. The fishing operation of the successful tenderer shall be subject to the supervision by the departmental staff without let or hindrance and the tenderer should afford all facilities to the departmental staff for the supervision of fishing operations, inspection of the places of storage of chanks and to check the accounts at all times with a view to ascertain the number of chanks actually fished and accounted for and to enforce the conditions of the lease. The successful tenderer shall also be subject to any stipulation regarding the wages to be paid to the divers that the State Government may deem fit to impose if necessary and shall also prepare accounts regarding the chanks fished, and amount paid to the divers in such forms as may be prescribed and send them to the Director of Fisheries and Assistant Director of Fisheries, Sivaganga, every month. Failure to comply with the conditions of the lease will entail forfeiture of earnest money, security deposit, cancellation of contract and re-sale of the lease at the defaulter's risk. The successful tenderer is required to engross these conditions of agreement on stamped paper and to get it registered within fifteen days from the date of intimation of acceptance of tender. The second respondent got up such a deed of agreement ready by 25th July, 1962, but before its execution these petitions were filed on 26th July, 1962 and on the same day, the petitioners obtained an *ad interim* injunction restraining the first respondent from leasing the fishery rights. After the respondents had entered appearance, as it was represented that the fishing season for the year would be over by the end of September and in view of the undertaking given by the second respondent to pay the petitioners such damages as the Court might fix at the time of the final hearing of the Writ Petition in the event of their claims being upheld, the *ad interim* injunction was vacated on 31st July, 1962. The petitions under Article 226 of the Constitution are for the issue of a writ in the nature of *mandamus* or any other appropriate writ or order directing the first respondent to forbear from taking further steps in respect of leasing out of fishery rights in Sivaganga waters pursuant to the tender notice dated 17th March, 1962. The petitioners say that they are the residents of Karungadu village, are fishermen by occupation and have no other occupation in life except fishing for chanks in the coast of Sivaganga and in the chank fishery extending from Sundarapandianpatnam to Karungadu. They further state that while they have been pursuing their normal avocation in life by fishing chanks in the Sivaganga waters, the second respondent informed them about ten days earlier that they should not thereafter fish for chanks in Sivaganga waters making it known that he had got an exclusive leasehold fishery right for the entire Sivaganga waters from the first respondent and that if they, in spite of the prohibition, were to fish in Sivaganga waters, criminal proceedings would be instituted against them. It is claimed for the petitioners that all fisheries in India and the matters relating to fisheries are governed by the provisions of the Indian Fisheries Act, 1897, that since, neither under the provisions of the Act nor the Rules framed thereunder, the State Government has been vested with a power to lease out the fishery rights in Sivaganga waters, the first respondent acted without jurisdiction in calling upon and accepting the tender for leasing the chank fishery rights. The petitioners maintain that no Rules have been framed and notified under section 6 of the Act vesting the State Government with a power to lease such rights, that since under Article 297 of the Constitution, all lands, minerals and other things of value underlying the ocean within the territorial waters of India vest in the Union and to be held for the purpose of the Union, the first respondent has no authority or jurisdiction over the Sivaganga waters

which is now one of the fisheries in the Indian Union and that any leasingout of rights to fish in the Sivaganga waters and consequent prohibition on fishing by the petitioners and other fishermen would amount to the imposition of an unreasonable restriction on the exercise of their fundamental rights under Article 19 (1) (*g*) of the Constitution. They add that the vesting of a monopoly of fishing rights in one person and consequential prohibition of all others, in any event, infringes the fundamental rights of the petitioners and other fishermen.

On the other hand, the respondents deny the petitioners' claim to any right to fish chanks in the Sivaganga waters and any fundamental right under Article 19 (1) (*g*) of the Constitution, and submit that, in view of this and as the petitioners cannot feel aggrieved by the lease, the petitions should be dismissed without further enquiry. In any case, say the respondents, the chank fisheries, as part of the assets of the Sivaganga Zamindari, became, on notification of the estate on September, 1949, under the provisions of Madras Act XXVI of 1948, exclusively vested in the State Government as its absolute property, that, as such property of the State, it is competent to deal with it in any manner it liked, just as it can deal with any other property vested in the State, that any lease granted by the State will operate according to its tenor notwithstanding any other law to the contrary by reason of the Government Grants Act, 1895 and that the lease in this case will not be subject to the provisions of the Fisheries Act, 1897. The respondents further submit that Article 297 of the Constitution has no application to this case because firstly of historical reasons, namely, the fishery rights were vested as private property under the Zamindari of Sivaganga and the State of Madras has become the owner under Act XXVI of 1948, and secondly the chank fishery is not affected by that Article. The respondents also stated that the Government at no time brought the chank fisheries under the Fisheries Act and that the Fisheries Act itself is one which gives the Government power to prohibit fishing except under a licence and is not an enactment which regulates the right of the Government to deal with wates and fisheries vested in the Government and that it is not incumbent upon it to make Rules under the Fisheries Act before it can lease out chank fishery right in the Sivaganga waters.

The substantial point for decision in these petitions will, therefore, be whether the petitioners have any right as fishermen and members of the public to fish chanks in the territorial waters of Sivaganga or whether alternatively the State of Madras has an exclusive proprietary right to the Sivaganga chank fishery. The other points for consideration are whether the Indian Fisheries Act, 1897, as amended in Madras, with the Rules framed thereunder apply to the chank fishery and the lease granted to the second respondent and what is the effect of Article 297 of the Constitution in respect of the chank fishery.

Before dealing with these matters in their order, certain general observations may be made. The Palk Bay and the Gulf of Mannar have been famous from the time immemorial for their pearl and chank fisheries. Both the Bay and the Gulf are partly bounded on the west by the districts of Ramanathapuram and Thirunelveli. The territorial waters of Sivaganga are in the Palk Bay which is of a length of about 130 miles and is practically land-locked on the west, north and south. The precise geographical situations and features of the Bay are described in *A.M.S.S.V.M. & Co.* v. *The State of Madras*[1], and need no repetition. About the chank and pearl fisheries in the Gulfs, general remarks are to be found in that case as well as in *Annakumaru Pillai* v. *Muthupayal*[2], and better set out in the words of Venkatarama Ayyar, J., himself who spoke for the Division Bench in the later case :

"From time immemorial, both these Gulfs have been famous for their pearl fisheries and chank fisheries. The rocks and reefs in which they abound have furnished excellent breeding-ground for pearl oysters. On the bottom of these Gulfs are sand-beds of a special kind called 'Pachi Manal' which breed worms on which chanks thrive. Beds of pearl-fish and chank fish are to be found in abundance scattered all over the area and they are marked in maps prepared for the Fisheries depart-

1. (1953) 2 M.L.J. 587: I.L.R. (1953) Mad. 1175.

2. (1904) 14 M.L.J. 248: I.L.R. 27 Mad 551.

ment. The chank beds are mostly at a depth, seldom exceeding 50 feet, often less and sometimes more and they lie at varying distances from the shore the farthest of them being 20 miles from the Indian coast. There are similar beds off the coast of Ceylon. The chanks, apart from their worth, as sacred sankhas have considerable commercial value as they are largely used for ornaments in Bengal and Assam and Tibet; and pearl fisheries and chank fisheries have accordingly been from the earliest times important and lucrative trades in this area."

It has also been noted that the Sivaganga waters extend from Sundarapandianpatnam to Karungadu in Ramanathapuram district. The Sivaganga Zamin itself originally formed part of the Ramnad Zamindari. The Fifth Report on East India Affairs edited by Firminger, Volume III, stated at page 397 :

"The Commission are aware, that the country called Sivaganga, was originally a part of the Ramnad Raj; that Curta Tavar, the Rajah of Ramnad, having divided the whole of his possessions into fifths, gave to Shasavurna Tavar two-fifths, reserving three-fifths for himself."

The considerations and the legal position, which apply to the Ramnad chank fishery, are, therefore, also applicable to the Sivaganga chank fishery.

On the main question the petitioners claim that under the custom and common law of this country, they have a common right to fish in the Sivaganga waters. To clear the ground, these petitions are not concerned with the claim to fishery in the waters other than the Sivaganga chank fishery. As to the common right of fishing in the territorial waters in England, the law is thus stated in 17 Halsbury's Laws of England, 3rd edition, paragaph 512 :

"At common law the public has a right to fish in the tidal reaches of all rivers and estuaries and in the sea and arms of the sea within the limits of the territorial waters of the kingdom (*l*) except where the Crown or some subject has acquired a proprietary exclusive of the public (*m*) right or where Parliament has restricted the common law rights of the public (*o*). Before Magna Carta the Crown could exclude the right of the public in any particular place by granting a several fishery to a subject and frequently did so; the Crown also had power by means of the writ *de defensione riparias* to bar fishing and fowling in any river, whether fresh or salt till the King had taken his pleasure there. Since that date however, these powers have ceased to exist and the public right can now be excluded or modified only by act of the Legislature."

Sri M. K. Nambiar, learned Counsel for one of the petitioners, submits that the law is the same in this country and that the petitioners, both as fishermen and as members of the public, have a common right to fish in the territorial waters of Sivaganga all fish including chanks. Learned Counsel points out that in fact section 3 of the Indian Fisheries Act, 1897, defines 'fish' to include 'shell-fish'. In *Regina* v. *Kastya Rama*[1] while on the question of jurisdiction of the trying Magistrate over offenders in respect of offences committed on the high seas but within three miles from the coast of British India, there was an elaborate consideration as to the ownership by the Crown of the soil under the sea within three miles from the coasts of territorial waters and common liberty of fishing in the sea, it was said :

"These authorities support both the ownership by the Crown of the soil under the sea, and the proposition that the subjects of the Crown 'have also by common right a liberty of fishing in the sea, and in its creeks or arms, as a public common of piscary.' Yet in some cases the King may enjoy a property exclusive of their common of piscary. He also may grant it to a subject; and consequently a subject may be entitled to it by prescription'. The Sovereign's rights are as great under the Hindu and Muhammadan systems as under the English; but, without a minute examination of these, it is sufficient to say that by the acquisition of India as a dependency, the Crown of Great Britain necessarily became empowered to exercise its prerogatives and enjoy its *jura regalia* in this country and on its coasts, subject always to the legislative control of Parliament. These are involved in the very idea of English sovereignty. I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea."

The rights of the Crown and of the public in the waters and the subjacent soil of the sea were again the subject-matter of discussion in *Baban Mayacha* v. *Nagu Shravucha and others.*[2] The parties to the suit in that case were all fishermen owning stakes and nets fixed off the coast of Salsette, at a distance of two and three miles from the shore. Previously to 1862, the plaintiffs or the predecessors sued the defendants or their predecessors to eject the defendants from a fishing ground claimed by the plaintiffs and to recover from them damages for trespass. The suit was dismissed and the decision was affirmed in appeal on the ground, *inter alia*, that the existence of

1. (1871) 8 Bom. H.C.R. 63 at 87. 2. (1876) I.L.R. 2 Bom. 19 at 32, 43.

private property in any portion of the open sea ought not to be recognised without direct evidence of the appropriation. In 1873 the plaintiffs brought the second suit to recover damages by reason of the defendants having maliciously and wrongfully erected fishing stakes at a distance of only 120 feet from those of the plaintiffs, whereby they wrongfully disturbed the plaintiffs in the enjoyment of their right to fish and unjustifiably prevented fish from getting into the nets of the plaintiffs and to obtain a perpetual injunction to restrain the defendants from so erecting their fishing stakes. Apart from the question of *res judicata* the Court had to decide whether the defendants had caused any injury to the plaintiffs so as to expose them to any liability in damages. In connection with that question, the Court enquired into the right of the Sovereign to the seas and the right of the public to fish in the sea and its arms and made certain observations some of which are :

"British authorities have laid it down that the British seas, to their geographical extent, whatsoever it may be, both as regards the land or soil beneath them, and the water, are vested in the sovereign. It has been said that the sea is the King's proper inheritance........ This includes not only the open sea, but all creeks, arms of the sea, havens, ports and tide rivers so far as the reach of the tide around the coast of the United Kingdom. Lord Chief Justice Hale, in his treatise De Jure Maris divides the King's right into two branches, *viz.*, (1) 'High right of jurisdiction which he ordinarily exerciseth by his admiral' and (2) 'His right of propriety or ownership' and deals with the latter thus :—

'The King's right of propriety or ownership in the sea and soil thereof is evidenced principally in these things that follow. 1st—The right of fishing in this sea and the creeks and arms thereof is originally lodged in the Crown, as the right of depasturing is originally lodged in the owner of the waste whereof he is Lord, or as the right of fishing belongs to him that is the owner of a private or inland river' .... 'But though the King is the owner of this Greate Waste, and, as a consequent of his propriety hath the primary right of fishing in the sea and the creeks and arms thereof; yet the common people of England have regularly a liberty of fishing in the sea or creeks or arms thereof; as a public common of piscary, and may not without injury to their right be restrained of it, unless in such places or creeks or navigable rivers where either the King or some particular subject hath gained a propriety exclusive of that common liberty' .... It should here be observed that although Lord Chief Justice Hale used the expression 'may grant', he must be understood as meaning that the King might, previously to Magna Carta have granted several fishery in a part or branch of the sea, or in tidal navigable rivers. Since Magna Carta he cannot in England or Ireland by grant thus abridge the public right.............We gather from the elaborate judgments in *Regina* v. *Kastya Rama*[1] that the learned Judges who gave them, regarded the sea and its subjacent soil within the ordinary territorial limit atleast around British India as vested in the Sovereign but held that the use of it for the purposes of navigation and fishing belonged *communis juris* to her subjects, at least so far as it had not been otherwise appropriated by the Sovereign ; and West, J., in speaking of the prerogatives of the Crown in India in this respect, said : 'I am not aware that in any case they have been so used as to exclude any subject in this country from fishing in any part of the sea. No grant of a fishery in the present case has been set up either as directly proved or as to be inferred from prescriptive enjoyment. The complainants and the applicants alike must rest on their common right of fishing in the sea; and a permission in favour of one or other of the parties by the villagers of Yerangal, as given without title, could confer none upon other'. Whether or not the sea and its subjacent soil be vested in the Sovereign as her property, would not seem to be a vital question, if there has not been by the Sovereign, as appears to be the fact, in the present case, any appropriation or attempted appropriation of the sea or its soil or the right of fishing in former to any particular individuals, for where there is no such appropriation, even if the sea and its soil be vested in the Sovereign, the right of fishing in the territorial waters of British India would be common to all her subjects in that country ; and if the sea and its soil be not so vested, the right of fishing in those waters would still, as well according to the Roman Law, as the law of nations, be common to the inhabitants of British India.............. the right of the Crown to the sea is not, in general, for any beneficial interest to the Crown itself, but for securing to the public the privileges of navigation and fishing ...."

Placing reliance on *Baban Maycha* v. *Nagu Shravucha*[2], and more especially the passages I have extracted therefrom, Sri Nambiar argues that the vesting of the soil underneath the territorial waters as well as the fishing right therein in the Sovereign was only as a trustee as it were and for the benefit of the public and in its interest, so that in England after Magna Carta, the King could not grant in derogation of or abridge the subjects' right, to common fishing, and that in India such beneficial right vested in the public and could only be taken away by an Act of Legislature.

As already mentioned, the Court here is not concerned with the petitioner's right, if any, to fish in the territorial waters of Sivaganga other than chanks. The very passages relied on by Sri Nambiar in the Bombay cases as well as the excerpt

1. (1871) 8 Bom. H.C.R. 67. 2. (1878) I.L.R. 2 Bom. 19.

above made from Halsbury's Laws of England show that, both in England and India, before the Constitution, a right to fish belonged *communis juris to* the subjects only in so far as it had not otherwise been appropriated by the Sovereign. These authorities make it clear that the Crown or some subject could acquire a property or ownership exclusive of the public right and in such a case, the exclusive right should prevail over the public.

So far as the chank fisheries along the sea coast of Southern India are concerned, there is ample authority both historical and judicial, to the effect that the Native Sovereigns throughout the ages, Pandiyas, Nayaks and Nawabs of Arcot and later the East India Company had regarded them as a fruitful source of revenue and held the fisheries of pearls and chanks as their exclusive property. They had either farmed out the right to fish the chanks and oysters in consideration of periodical payments on lease, or other arrangement or directly worked the chank and pearl fisheries. Two of the cases *Annakumaru Pillai* v. *Muthupayal*[1], and *A.M.S.S.V.N. & Co.* v. *The State of Madras*[2], which related to chank fishery itself along the Ramnad coast, referred to considerable historical authority and facts and regulations, to hold that chank fishery along the Ramnad coast was the exclusive property of the Rajah of Ramnad. The question directly arose for decision in the earlier case where the lessee of the Rajah of Ramnad of chank fishery charged the accused there with theft of chanks from the chank-beds of Ramnad. As the offence of theft involved a dishonest taking of movable property out of the possession of another, it had to be decided whether the chanks were capable of being regarded in law as the property of the lessee of the chank-bed and were in his possession before their alleged taking by the accused. These questions were answered in the affirmative and in favour of the lessee. In the first instance the case in the form of a Criminal Revision Case came before the then learned Officiating Chief Justice Subramania Ayyar and Russell, J. Since they differed on both the questions as to whether the chanks were the properties of the lessee and were in his possession before they were taken by the accused, the case was finally placed before and decided by a Full Bench consisting of Benson, Boddam and Bashyam Ayyangar, JJ. The learned Officiating Chief Justice, after referring to the fact that chank shells have long been used in this country for various purposes for making bracelets or ornaments worn largely by the women of northern parts of India or as articles of worship in Hindu temples, the shells being considered to possess purity and that valampuri chanks or shells with the whorl on the right were specially prized and fetched high prices observed :

"And chanks as well as pearl oysters while still in the beds have always been taken to be the exclusive property of the Sovereign, by whom, consequently, they have been conserved; and the fishery operations connected therewith have always been carried on under State control and have formed a source of revenue to the Exchequer. The Setupatis of Ramnad appear to have enjoyed both the pearl and the chank fisheries on the Ramnad coast while they were feudatory chiefs, but when they ceased to be such the right to pearl fisheries on the coast was apparently taken away, the right to the chank fisheries alone being continued to them. It has been viewed by some that chank fishery operations tend to injure pearl oysters and this view has led to the discontinuance of chank fisheries on the Ceylon coast. Such a notion, however, has been strongly controverted and has not been acted upon with reference to the fisheries on our coast (Mr. Thomas's Report, page 15, section 91). Our chank fisheries are worth to Government from four to five times as much as our pearl fisheries and may, it is said easily be raised to half the present value of the Ceylon pearl fisheries (Mr. Thomas's Report, page 28, section 91). These latter brought into the State in a certain year towards the close of the 18th century as much as £140,000 though, under subsequent management, the revenue has never exceeded £87,000 in any one year (Encyclopaedia Britannica Vol. V, page 364). According to Dr. Balfour the rents received annually in respect of chank fisheries by the Government of Madras was about £1,000 those received by the Setupatis of Ramnad being £500 (Vol. 1, page 656). According to the latest information available the average revenue during the 25 years from 1876-77 to 1902-03 (not reckoning 1884-85 in which for some reason not apparent there was no fishery) derived by the Madras Government from the chank fisheries under the control of the Superintendent of Fisheries at Tuticorin amounted to Rs. 12,000 (in round numbers), the maximum derived in one year being that of 1881-82 *viz.* Rs. 28,000 (G.O. No. 1025, dated 6th October, 1903)."

....

"Such being the position and circumstances of the Gulf and the surrounding country having, from very early times, been inhabited by comparatively civilized races, the Gulf, moreover being as

1. (1904) 14 M.L.J. 248 : I.L.R. 27 Mad. 551 at 554, 564.
2. (1953) 2 M.L.J. 587 : I.L.R. (1953) Mad. 1175.

it were stocked with the already-mentioned rich sources of wealth and commerce, the rulers of these coasts who were shrewd to make revenue out of the sea water by making the manufacture of salt a State monopoly, were of course not slow in making revenue out of those sources as well. The fisheries in question were thus established and have been handed down from sovereign to sovereign until, about the end of the 18th or to the beginning of the 19th century they became vested in the British. All this is clearly told by authentic historians and travellers and for the present purpose it is not necessary to make more than a few references.

'Friar Jordanus, a quaint old missionary bishop', says the author of the Article of Pearl in Balfour's '*Cyclopaedia*', 'who was in India in 1330, says that 8,000 boats were engaged in this fishery and that of Ceylon and that the quantity of pearls was astounding and almost incredible. The headquarters of the fishery was then, and indeed from the days of Ptolemy to the 17th century continued to be, at Chayl or Coil literally, the temple, on the sandy promontory of Ramnad, which sends off a reef of rocks towards Ceylon known as Adam's bridge. And Ludovico de Varthema mentions having seen the pearls fished for in the sea near the town of Chayl in about A.D. 1500; and Babbosa, who travelled about the same time, says that the people at Chayl are jewellers who trade in pearls. This place is, as Dr. Vincent has clearly shown, the Koru of Ptolemy, the Kolkhi of the author of Periplus, the Coil or Chayl of the travellers of the middle ages, the Ramanakoil (temple of Rama) of the natives, the same as the sacred promontory of Ramnad and the isle of Rameswaram the headquarters of the Indian Pearl fishery from time immemorial.' Though in this passage no express allusion is made to the fisheries being King's monopoly, that undeniable and well-known fact is mentioned elsewhere. From example Sir James Emerson Tennent on his work on Ceylon observes: 'Monopolies are to the present day a prominent feature of the Ceylon revenue. The fishery of pearls and chanks has been, from time immemorial, in the hands of the sovereign' (5th Ed., Vol. II, p. 169). That this was also the case with regard to the fisheries on the opposite coast (that of Tinnevelly and Madura), while the country was still in the hands of Hindu Rulers and down to a period not long anterior to the accession of the Nawab of the Carnatic to power, will be seen from the following extracts which I make from Nelson's 'Manual of the Madura Country'—'Another and productive source of revenue was the great pearl fishery which was carried on annually from Cape Comorin to the island of Pamban. A rough idea of its value may be formed from a statement in Jesuit letter of the year 1700 which describes the fishery, to the effect that the Dutch used to grant licences to fish for pearls to all applicants at a uniform rate of about 60 Ecus for each vessel employed in the fishery, and that sometimes as many as 600 to 700 vessels were so employed. The net sum realised must, therefore have been about 36,000 Ecus. And it was realised from the fishery along the Tinnevelly coast only: the Ramnad coast being then fished by the Sethupathi, to whom it belonged' (page 154, Part III, Nelson's 'Madura Manual'). 'They durst not attempt to coerce either the Sethupathi or the King of Madura and they took nothing by an embassy which they sent to the former, together with some valuable presents, for the purposes of inducing him to make over to them all his right and title to the profits of the pearl fishery on his coasts. They had obtained from the King of Madura the monopoly of the fishery of the Tinnevelly coast and drew a considerable revenue from licences to fish which thy granted to all applicants' (page 227 *ibid*). 'And the conch-shell fishery must also have produced a considerable revenue if, as seems, probable, the King enjoyed the monopoly of it' (p. 154, *ibid*). 'The conch shell fishery was also theirs (belonging to the Dutch) within the same limits as the pearl fishery and yielded a considerable profit' (p. 227, *ibid*). It is scarcely necessary to add that it is matter of quite recent history that the fisheries on the said coast of the mainland passed into the hands of the East India Company on the cession to it by Nawab of the Carnatic of the revenues thereof while the Ceylon fisheries vested in the British Crown on the conquest of Ceylon from the Dutch.

Now, considering that the various European maritime powers, who from about 16th century were contending for supremacy in the Indian seas, raised no question as to the right of the sovereigns for the time being of the Carnatic and Ceylon to their respective fisheries, there can be little doubt that such right was regarded by one and all of them as unassailable. Nor is high authority in terms referring to and recognising it wanting. Vattil, himself a strong adherent of the doctrine that the open sea is not susceptible of exclusive dominion, while dealing with the question of special appropriation of part of the sea, writes thus in a well-known passage:

'The various uses of the sea near its coast render it very susceptible of property. People there fish and draw from thence shells, pearls, amber, etc. Now in all these respects its use is not inexhaustible; so that the nation to whom the coasts belong may appropriate to itself an advantage which it is considered as having taken possession of and make a profit of it in the same manner as it may possess the domain of the land it inhabits. Who can doubt that the pearl fishery of Bahrem and Ceylon may not lawfully be enjoyed as property? And though a fishery for food appears more inexhaustible. If a nation has a fishery on its coast that is particularly advantageous and of which it may become master, shall it not be permitted to appropriate this natural advantage to itself as a dependence on the country it possesses?' (Book 1, Chapter XXIII, section 227, page 115, Translation of 1759.)

With so emphatic a pronouncement by such a publicist as to the lawfulness of the exclusive possession of the fisheries in question unbrokenly enjoyed from ancient times and with instances of exclusive occupation which have taken place almost under our own eyes with reference to pearl fisheries in Shark's Bay, etc. in Western Australia and which include pearl banks beyond the marine league limit, one may with confidence lay down that, to say the least, the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits of the fisheries in question, are British territorial waters. It therefore, follows that the petitioner is not precluded in law from making out a good title to chanks in the localities specified by him, by the mere

fact that they lie beyond the distance of a marine league from low water mark, if he can show that the immemorial right under which he claims extends to such localities."

I think I need make no apology for this long excerpt from the judgment of the learned Officiating Chief Justice which is very much to the point in question that I have to decide. Russell, J., took a different view and was prepared to take the view that the Rajah of Ramnad was not the owner of the bed of the sea below the low water mark and that the chanks were *feras naturas*. The Full Bench, however, agreed with the conclusions of the learned Officiating Chief Justice and observed at page 574 :

"Both (green chanks and white chanks) are collected and are articles of very considerable utility and commercial value. The evidence shows that for many hundreds of years they, like the pearl oysters which are generally found in adjacent beds, have been the monopoly of the Rulers of the country both in India and Ceylon, and that licences to gather them have been granted by the Sovereign In addition to the facts stated by the Officiating Chief Justice in his judgment we may say that, when it was determined to make a permanent settlement of the revenue of the Ramnad Zamindari in 1802 we find the 'chank royalty' named as one of the eight heads of revenue on which the permanent assessment was fixed (Nelson's Manual, Part IV, page 153), and it appears that in 1808 this chank royalty was hypothecated to Government as security for arrears of revenue. In 1874, the chank royalty 'in the seaports mentioned in the margin' (which included Mudiampatnam now in question) was attached for arrears of revenue, and so lately as 1889 and 1900 Government itself leased the chank fisheries from the zamindar .... The exclusive property in these chanks has in fact been held by Government from time immemorial and has been leased out for the benefit of the public revenue, and this is in accordance with the common law of the country which recognises the power of Government to make settlements or grants for purposes of revenue of all unsettled and unappropriated lands whether covered by water or not covered by water and, therefore, of the produce or portions of the produce of such lands. *Hari Das Kal* v. *Mahomed Jaki*[1], per Garth, C.J., on behalf of the Full Bench, and *Vyasa* v. *Tatayya*[2]."

The ultimate conclusion of the Full Bench was thus stated :

"In our view, then, the chanks which the accused in this case are alleged to have stolen were capable of being the subject of theft and were taken, not from the bed of the high seas, but from an arm of the sea which is part of the territory of British India which has been in possession of the Crown from time immemorial. It is not denied that Crown has included the revenue derivable from the chanks in the permanent settlement of the zamindari under Regulation XXV of 1802 and that the Ramnad Zamindar has leased them to the complainant. If the taking of the chanks was dishonest it would be theft."

Annakumaru Pillai v. *Muthupayal*[3] therefore, held beyond doubt that chanks in the territorial waters of Ramanathapuram formed part of the assets of the Rajah of Ramnad and belonged exclusively to him as his own property. What is more important to notice is that the accused in that case was regarded as having no right to fish chanks along the Ramanathapuram coast and that if he took the chanks dishonestly, he would be liable to conviction for theft.

Apart from the indisputable historical evidence that from time immemorial, Native Rulers exclusively appropriated from and held the chank fishery right in the territorial waters of Ramanathapuram and the incontrovertible fact that the Rajah of Ramanathapuram had exclusive possession of the chank fishery, that it was included as part of the assets of the Ramanathapuram Zamindar in the permanent settlement under Regulation XXV of 1802 and that he had leased out his right from time to time and derived revenue for himself, it seems equally incontrovertible that the Provincial Government of Madras itself was taking, from time to time, from the Raja of Ramnad periodical leases of the right to fish chanks in the Ramnad coast for over a long time. In the counter-affidavit of the first respondent it is stated, and it is not denied by the petitioners that from the available records it is seen that at least from 1914 the Government had taken the chank fishery on lease from the Zamindar of Sivaganga, the latest one of such leases being the one authorised by the Government in G.O. No. 1734, Development, dated 29th April, 1946, for a period of five years and the proceedings of the Dewan of the Estate of Sivaganga, dated 16th May, 1946. The first respondent also maintains in the counter-affidavit that whenever the Government was the lessee of the chank fishery, it did not allow anyone to dive and collect the chanks for himself and that whenever the fishermen went out for fishing for fish with nets and if there

1. I.L.R. 11 Cal. 434 at p. 444.
2. I.L.R. 8 Mad. 467 (F. B.).
3. (1904) 14 M.L.J. 248 : 27 Mad. 551.

were any chanks sticking to those nets, such fishermen would be compelled to hand over those chanks to clerk of the department who was posted in the area. The facts too have not been specifically denied by the petitioners. When the last lease in favour of the Provincial Government was subsisting the estate of Sivaganga was notified on 7th September, 1949 under the provisions of Madras Act XXVI of 1948 and as a result, the Sivaganga estate including chank fishery vested in the Government absolutely on and from that date. Subsequently the control of the Sivaganga chank fishery would appear to stand transferred to the Fisheries Department pursuant to the directions by the Government in G.O. Ms. No. 1660, Development, dated 12th April, 1951. It is stated for the first respondent in his counter-affidavit that from 1951 to 1956 the chank fishery of Sivaganga were not leased out by the Government but were worked out by the department and during this period the fishermen who collected chanks from the nets were required to hand over the collections to the department and towards the end of 1955 and the beginning of 1956 departmental fishing with divers was undertaken and chanks were collected. From 1st June, 1956 the chank fishery rights in the Sivaganga waters were leased out by the State Government for two periods of three years each, namely, from 1st June, 1956 to 31st May, 1959 and 1st June, 1959 to 31st May, 1962. After the expiry of the last lease, tenders were again called for which resulted in the lease in favour of the second respondent. After the Sivaganga estate was taken over and vested in the State Government under Madras Act XXVI of 1948, by notice the State Government acting under section 20 of the Act as it stood then, terminated the unexpired portion of the lease which led to *A.M.S.S.V.M. & Co.* v. *The State of Madras*[1]. The lessee in that case unsuccessfully contended that the termination by the Government by notice, dated 3rd March, 1951 of the lease was invalid as Madras Act XXVI of 1948 was beyond the competence of the Madras Legislature in so far as it related to the fishery. Before dealing with that question, a Division Bench of this Court consisting of the learned Chief Justice and Venkatarama Ayyar, J., referred to the geographical features of Palk Bay and Gulf of Mannar, the commercial and other value of pearl fisheries and chank fisheries in the bed of the gulfs and historical evidence relating to the ancient Native Rulers owning chank fisheries as their exclusive property and deriving revenue therefrom. The learned Judges observed :

"The Soverign of the country considered themselves as the exclusive owners of the beds of pearl oysters and chanks, granted licences for their exploitation and levied royalty thereon. At the dawn of history the coastal area on the Indian side formed part of the Pandyan Kingdom. It appears from the writings of ancient writers like the authors of Periplus Erithrad Maris (about 80 A.D.) and Ptolemy (about 140 A.D.) that a place called Korkai was the head quarters of the pearl fishery of the Pandyan Kings. Kalidas mentions that the Pandyan King offered as his tribute 'superior pearls obtained from the sea at its confluence with Tambraparni'.

ताम्रपर्णी समेतस्य मुक्तासारं महोदधेः

(Raghuvamsa, Canto 4, verse 50.)

In the Middle Ages Kayal became the centre of the pearl fishery and 'according to Friar Jordanus, no less than 8,000 boats were employed in the Fisheries of Tinnevelly and Ceylon' .... After the Pandyas, the Nayaks became the Sovereigns of the country and they recognised the title of Rajah of Ramanathapuram who claimed descent from ancient Royal Houses to the coastal territory and also granted to him the right of levying royalties on chank fisheries off the coast. The right of fishery over the rest of the Indian coast was granted to the Dutch. The Nawab of Arcot supplanted the Nayaks in the Middle of the 18th Century and in 1872 the East India Company succeeded to their rights. The Madras Permanent Settlement Regulation XXV of 1802 was then passed under which the Government entered into engagements with Zamindars fixing a permanent peshkush. The Zamindari of Ramanathapuram was one of the estates so settled and in fixing the peshkush the right of chank fisheries was included in the assets of the Zamindar being the 8th item described as 'chank royalty'. In accordance with this Sanad, the successive proprietors of the Ramanathapuram estate continued in enjoyment of the chank fisheries leasing the same from time to time. It may be mentioned that in 1803 the chank royalty of the Rajah was given as security to the Government for payment of peshkush and in 1874 it was attached for arrears thereof. In 1899 and 1900 the Government itself took a lease of these fisheries from the Rajah of Ramanathapuram. The income from the fisheries was at all times one of the valuable assets of the estate."

I have already mentioned that Sivaganga had originally formed part of the Zamindari of Ramanathapuram and, therefore, the observations of the Division

1. (1953) 2 M.L.J. 587 : I.L.R. (1953) Mad. 1175.

Bench relating to the title of the Rajah of Ramanathapuram to the chank fisheries equally apply to the chank fisheries in the territorial waters of Sivaganga. Consequent upon the abolition of the estate of Sivaganga and its vesting in the Province of Madras, and now the State of Madras, it must be held, therefore, that the State Government is exclusively entitled to the chank fishery in the territorial waters of Sivaganga. It follows that the petitioners either as fishermen or members of the public have no common right to fish chanks in those waters and appropriate the same for themselves. If the petitioners have no such right, on this finding alone, as rightly urged by the learned Advocate-General, the petitions should be dismissed as totally lacking any basis for the complaints made therein. In fact in circumstances somewhat similar to those present here, Rajagopala Ayyangar, J. (as the learned Judge then was) dismissed *in limine* W.P. Nos. 1269 and 1270 of 1956. Two objections were raised on behalf of the petitioners in those petitions: (1) that the Government had not enforced the terms of the conditions and had granted the lease to the second respondent-firm there, which was then composed of more partners than what it was constituted of at the time of the tender; and (2) that no Rules had been framed under the Fisheries Act and so the petitioners had also a right to fish for chanks in the area leased. As to the first, the learned Judge observed that it was for the Government and not for the petitioners and as to the second if the petitioners were right, they could fish and take the consequences but that did not render the lease to the second respondent invalid or give a right to them to challenge it. The appeals (W.A. Nos. 1 and 2 of 1957) against the order of Rajagopala Ayyangar, J., were also summarily dismissed. While agreeing with the learned Judge, the appellate Bench was also of the opinion that if the appellants were prevented from exercising their alleged right, they certainly had the ordinary remedy in a civil Court. But since I have now heard elaborate arguments on the points raised in these Writ Petitions, I have preferred to consider them and render my decision thereon.

Sri Nambiar, whom I have not heard to controvert or deny the historical facts adverted to in the decision above mentioned and to which I have made reference contends, however, that *Annakumaru Pillai* v. *Muthupayal*[1] must be regarded as having been rendered *per incuriam* because it was in total disregard of the provisions of the Indian Fisheries Act. This argument involves a consideration of the relevancy and applicability of the provisions of that Act to the facts and circumstances of these petitions. There is no doubt that in principle a decision rendered by even the highes judicial authority will have no binding force as a precedent if it was rendered in total ignorance or disregard of a relevant statute or statutory rule. Observed Lord Greene, Master of the Rolls, on behalf of the English Court of Appeal in *Young* v. *Bristol Aeroplane Co., Ltd.*[2]

"It (where the earlier decision was given *per incuriam*) depended upon the true meaning (which in the later decision was regarded as clear beyond argument) of a rule of the Supreme Court to which the Court was apparently not referred and which it obviously had not in mind .... Where the Court has construed a statute or a rule having the force of a statute, its decision stands on the same footing as any other decision on a question of law. But where the Court is satisfied that an earlier decision was given in ignorance of the terms of the statute or a rule having the force of a statute, the position is very different. It cannot, in our opinion be right to say that in such a case the Court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given *per incuriam*."

I have therefore, to see whether Sri Nambiar is right in his contention that the learned Judge decided *Annakumaru Pillai* v. *Muthupayal*[1] in ignorance or in disregard of the provisions of the Fisheries Act and the Rules made thereunder. The argument of course assumes that the chank fisheries in the territorial waters of Sivaganga are governed by that Act and the Rules.

The Indian Fisheries Act enacted in 1897 contains seven sections, the first of them which related to title and extent; the second to read the Act as supplemental

1. (1904) 14 M.L.J. 248 : I.L.R. 27 Mad. 551. 2. (1944) 2 All E.R. 293 at 300.

to other enactments relating to fisheries; the third contains definitions; the fourth and the fifth prohibit destruction of fish by explosives in inland waters and on coasts and by poisoning waters. Section 6 provides for protection of fish in selected waters by rules to be made by the State Government. The Act of course extends to the whole of India except the territories which immediately before 1st November, 1956 were comprised within Part B States. The word 'fish' is defined to include 'shell fish' and the phrase 'private water' to mean water which is the exclusive property of any person or in which any person has for the time being an exclusive right of fishery whether as owner, lessee or in any other capacity. There is an *Explanation* to the definition which says that water does not cease to be 'private water' within the meaning of the definition by reason only that other persons may have by custom a right of fishery therein. 'Water' for the purpose of section 4 relating to destruction of fish by explosives in inland waters and on coasts includes the sea within a distance of one marine league off the sea coast. Sub-section (1) of section 6 states that the State Government may makes Rules for the purposes specified in the section and may by notification in the *Official Gazette* apply all or any of such Rules to such waters not being private waters, as the State Government may specify in the said notification. As regards private waters, sub-section (2) of section 6 provides that the State Government may also by notification apply such Rules or any of them to such waters with the consent in writing of any of the owners thereof and of all persons having for the time being any exclusive right of fishery therein. The matters for such regulations or prohibition by Rules are stated by sub-section (3) of section 6 to be erection and use of fixed engines, construction of weirs and the dimension and kind of nets to be used and the modes of using them. Under sub-section (4) Rules made by the State Government may also prohibit all fishing in any specified water for a period not exceeding two years. Sub-sections (3) and (4) of section 6 have been amended by Madras Act II of 1929, the former by insertion of some words and the latter by substitution of a new sub-section which reads:

"(4) Such rules may also prohibit all fishing in any specified water except under a lease or licence granted by Government and in accordance with such conditions as may be specified in such lease or licence:

Provided that no rule shall be made under this sub-section to prohibit sea fishery other than pearl fishery or chank fishery unless, after previous publication under sub-section (6) of this section, it has been laid in draft before both the Houses of the State Legislature and has been approved by a resolution of both those Houses either with or without modification or addition; but upon such approval being given the rule may be issued in the form in which it has been so approved."

Contravention of the prohibition under sections 4 to 6 is an offence and section 7 provides for a limited procedure for arrest without warrant of the offenders under the Act. By a notification of the State Government in December 1913, Rules were made in exercise of the powers conferred by sub-sections (1) and (3) to (5) of section 6. These Rules define 'chank' as meaning chank or conch *turbinella pyrum* or *turbinella rapa*; and 'chank bed' as the bed of the sea specified in Schedule I appended to the Rules. Schedule I to the Rules specifically provides the area of pearl banks. Rule 2 prohibits fishing or diving for pearl oysters or chanks in the area specified in the Schedules I and II or collecting pearl oysters or chanks from any pearl bank or chank bed or using any vessel for any such purpose except under a licence in the form prescribed in Schedule III to the Rules granted by the Local Government.' It is further provided in Rule 2 that every holder of the licence shall strictly abide by the terms and conditions contained therein. The methods of fishing and diving and all other connected operations for the collection of pearl oysters and chanks are required by Rule 3 to conform strictly to the Rules and conditions under which the licence is issued. Breach of Rule 2 is made by Rule 4 punishable with fine and a continuing breach with a further fine subject to certain limits. Schedule II to the Rules defines the area of the chank bed as the bottom of the sea between the low water line and 12 fathoms contour off the Presidency of Madras excluding the coast of the Ramnad and the Sviaganga Zamindaris in the Ramnad district. The diver's licence the form of which is prescribed in Schedule III, states that the licence is to be issued in the name of the licensee who is permitted to dive from a specified boat for collecting chanks and

that the licence is also issued subject to certain conditions. Among such conditions are, the licensee shall not dive for chanks anywhere except in the place specified by the Fisheries officers and shall cease diving immediately the signal to cease diving is given; he shall not also fish chanks measuring below certain specification. These conditions also require that the licensee shall land the whole catch of chanks in the place on the beach specified by the Assistant Director of Pearl and Chank Fisheries, carry the day's catch to the Government godowns and deliver the same to Fisheries officers appointed to receive them. For the services of the licensee, he shall receive payment as provided in the conditions of the licence for all full-sized chanks without defects which are in conformity with the specifications. Those shells below the specifications shall also be delivered to the Government free of charge. The licence shall be produced on demand by any officer of the Fisheries or other department specifically authorised to do it. A boat-licence also is issued under the Rules in the form prescribed which shows that the person named in the licence will be permitted to use the boat specified therein for collecting chanks and it shall carry persons not exceeding a prescribed limit. This licence is issued subject to certain conditions one of which is that the licensee shall produce the licence on demand by any officer of the Fisheries or other department specifically authorised to do so. These Rules were amended by the Provincial Government by notification issued in February, 1959, the most important of which is that the words " Presidency of Madras excluding the coast of the Ramanathapuram and the Sivaganga Zamindaris in the Ramanathapuram district " in Schedule II of the original Rules were substituted by the words " State of Madras". The result of the amendment was that the exclusion from the scope of the Rules of the coast of the Ramanathapuram district was dropped and the entire coast of the State of Madras was brought within the ambit of Schedule II of the Rules.

It may be seen that the provisions of the Indian Fisheries Act as well as the Rules framed thereunder which I have noticed above, are regulatory in character, the object being to protect fish, which includes shell-fish from destruction by use of dynamite and poison in all waters within the then British Jurisdiction in India, the prohibition of course being restricted in respect of dynamite to the territorial waters, and to empower the Local Government to make Rules and to apply them to any selected streams or other waters belonging to the State or to any other streams or waters with the consent of the persons owning them or interested therein. The scope of the Rule extends to prohibition or regulation of the use of fixed engines for the capture of fish and the construction of weirs, use of nets with a mesh below a minimum size, capture or sale of all or any kinds of fish during any close season and total closure of any waters for a period not exceeding two years. The regulatory provisions are made effective in application by making contravention an offence punishable with fine. Under the Madras Amendment of the Act in 1929, such Rules may also prohibit all fishing in any specified water except under a lease or licence granted by Government and in accordance with such conditions specified in the lease or licence. As a result of this amendment, the limit of two years for prohibition of all fishing was lifted. It may be noted that what is provided by section 6, as amended by the Madras Legislature, is power to make Rules on matters and in the manner specified. The Rules as framed and amended in Madras however, as already noticed, provide that chanks in the areas specified in Schedule II should not be collected by fishing or diving or by use of any vessel for such purpose except under a licence. The Rules did not say that these operations could be carried on, under a lease as well, granted by the Local or State Government or by any officer empowered in that behalf. It is on this Sri Nambiar places strong reliance and argues that as there is no provision in the Rules for the Government to lease the right to collect chanks in the Sivaganga coast excepting by that means, the general prohibition and the lease granted to the second respondent is invalid. But it is apparent from the provisions of the Act as well as the Rules framed thereunder that their object expressly or by implication was neither to confer a right upon any one which he did not otherwise previously own or possess, nor take away a right which a person had already owned or possessed. They did not and do not

affect in any way the right to property as such in chank fisheries vested either in the Crown at the relevant time or the Union or the State Governments or private bodies or individuals. There is nothing in them to suggest that exclusive or proprietary rights in such fisheries should not be exercised or asserted by the properties quoad owners. In fact, the Act itself, as I stated, defines 'private water' as exclusive property of any person or in which any person has for the time being an exclusive right of fishery whether as owner, lessee or in any other capacity, and the Rules framed under section 6 can be made applicable to such waters only with the consent in writing of the owners of such waters or of persons having for the time being any exclusive right of fishery therein. The aim of the Act and the Rules is no more than to conserve the wealth of fish including, of course, chanks, by prohibiting indiscriminate destruction in specific ways and to afford protection to fish in waters including selected waters. The regulatory provisions, both in the Act and the Rules, has never been as far as I can see, intended to and do not confer a right upon the public including the petitioners as fishermen to fish chanks, in the Sivaganga waters which belonged exclusively to the Sivaganga Zamindari before its abolition. In fact this position was also recognised by the Rules framed by the Provincial Government in 1931 in which the coasts of Sivaganga and Ramanathapuram were excluded from their purview. I cannot, therefore, accept the contention of Sri Nambiar that *Annakumaru Pillai* v. *Muthupayal*[1] was decided *per incuriam* overlooking or disregarding the provisions of the Indian Fisheries Act. As a matter of fact, when the decision was rendered, even the Rules under section 6 had not been framed by the Provincial Government. The conclusion on this discussion of the provisions of the Indian Fisheries Act and the Rules framed thereunder, as amended in Madras is to my mind irresistible that they entirely left untouched the exclusive rights of fishery, their incidence and exercise subject to limited regulation with the written consent of those entitled to such rights and conferred no rights upon the general public in derogation of such exclusive rights. The petitioners cannot, therefore, claim that either the Indian Fisheries Act or the Rules framed thereunder gave them or recognised in them as members of the public or fishermen, any right to dive or otherwise fish and catch chanks in the Sivaganga waters and appropriate the same for themselves. In fact, under the Rules the petitioners do not even have a right to dive without a licence and the prohibition against fishing in the waters of Sivaganga except under a licence or lease is not certainly declaratory or an affirmance in any way of any right in the petitioners. The status of persons who dive under a licence in the Ramanathapuram coast is no more than that of workmen employed by the State and the relationship between them and the Government, when it worked its rights under a lease in respect of exclusive fishery in chanks in Ramanathapuram coast was that of an employee and the employer. That was the decision in *Muthumeenatchiya* v. *Assistant Director of Fisheries*[2]. Basheer Ahmed Sayeed, J., held in that case that the work of the divers was such that they had to perform the duties in accordance with the conditions which had been imposed and which they had to observe strictly in the course of performing their job and that having regard to the control which the Government exercised over such divers in regard to the manner in which they had to discharge their duties, the relationship of employer and employee or master and servant existed between the Government and the licensed divers. This decision was affirmed in appeal by a Division Bench of this Court in Letters Patent Appeals Nos. 100 and 101 of 1959. It was true that this case arose under the provisions of the Workmen's Compensation Act and the question that had to be decided was whether the divers were workmen within the meaning of that Act. But the point to be noted is that the claimants there could not have succeeded if the divers had done their work in exercise of their right, if any, to fish chanks in Ramanathapuram coast and appropriate the same for themselves.

If the petitioners have no right to fish chanks in the waters of Sivaganga either under the provisions of the Indian Fisheries Act or the Rules framed thereunder

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1. (1904) 14 M.L.J. 243 : I.L.R. 27 Mad. 551. 2. (1959) 2 M.L.J. 431.

or independently of them; as I hold they have none, I fail to see how they are entitled to question the validity of the lease granted by the Government to the second respondent, in respect of the right to fish chanks in the Sivaganga waters as the exclusive property of the Government. It was on that ground, among others, as already mentioned, W.P. Nos. 1269 and 1270 of 1956 and W.A. Nos. 1 and 2 of 1957 filed by different petitioners questioning the validity of a lease granted by the State of Madras to the second respondent there were dismissed *in limine*. On behalf of the petitioners, my attention has been invited to *The State of Assam* v. *Keshab Prasad Singh and another*[1] and *K. N. Guruswamy* v. *The State of Mysore*[2], but in view of the conclusions I have reached, I fail to see how they are of any assistance to them.

This leads me to the last argument of Sri Nambiar based on Article 297 of the Constitution, though in the view I have taken above, it may not in any event help the petitioners. Whether the chank fishery in the territorial waters of Sivaganga after 26th January, 1950 is the property of the Union Government or continues to belong to State Government by virtue of the abolition of the Sivaganga estate and its assets including the chank fishery being absolutely vested in the State of Madras prior to the Constitution, is entirely a matter between those Governments and does not concern the petitioners so far as their assumed common right to fish chanks in those waters is concerned. Prior to the enactment of Government of India Act, 1935, the set-up of the Government of India being unitary, no question could arise of any property being vested in the Government of India or the Provincial Government. The entire property stood vested then in the Crown represented by the Secretary of State for India. But, for the first time under the Constitution Act of 1935 by section 172 a scheme of division of properties came about vesting all the property in a Province in the Provincial Government subject to exceptions, and the rest, together with the properties covered by such exceptions, in the Central Government. Part XII, Chapter III of the Constitution of India deals with property, contracts, rights, liabilities, obligations and suits. Article 294 provides for succession by the relative State or the Union Government as the case may be, to the respective property, contracts, liabilities and obligations which had severally stood vested in them prior to 26th January, 1950 subject of course to adjustment consequent upon the division and constitution of the Dominion of Pakistan or of the Provinces of West Bengal, East Bengal, West Punjab and East Punjab. Articles 295 and 296 deal respectively with succession to property, assets, rights, liabilities and obligations in respect of Part B States and with property accruing by escheat or lapse or as *bona vacantia*. Article 297 reads :

> "All lands, minerals and other things of value underlying the ocean within the territorial waters of India shall vest in the Union and be held for the purposes of the Union."

The next Article as substituted by the Constitution (Seventh Amendment) Act, 1956 states :

> "The executive power of the Union and of each State shall extend to the carrying on of any trade or business and to the acquisition, holding and disposal of property and the making of contracts for any purposes provided that—
>
> (*a*) the said executive power of the Union shall, in so far as such trade or business or such purpose is not one with respect to which Parliament may make laws, be subject in each State to legislation by the State ; and (*b*) the said executive power of each State shall, in so far as such trade or business or such purpose is not one with respect to which the State Legislature may make laws, be subject to legislation by Parliament."

The rest of the Article in the Chapter it is unnecessary to notice for present purposes. Entry 57 of the List I in Seventh Schedule relates to fishing and fisheries beyond territorial waters and Entry 21 in List II of the same Schedule, to fisheries. So fishing within the territorial waters is subject to State Legislative power. The argument of Sri Nambiar is that as under Article 297 lands, minerals and other things of value underlying the ocean within the territorial waters of India vested

1. (1953) S.C.J. 429 : 1953 S.C.R. 865. 2. (1954) S.C.J. 644 : (1955) 1 S.C.R. 305.

in the Union, it must be held that, even on the assumption that chank fishery in the territorial waters of Sivaganga was the absolute property before 26th January, 1950 of the then Provincial Government, subsequent to that date the fishery became vested in the Union and since then it is held by the Union for the purposes of the Union and that the State Government can no longer claim the chank fishery as absolutely belonging to it. His further proposition is that the fact that Article 298 read with the relative legislative entries confers power upon the State Legislature to legislate on fisheries including in territorial waters, does not imply proprietary right of the State in such fisheries. On these premises it is stated for the petitioners that the State Government had no right to lease out the Sivaganga chank fishery either as the proprietor or under the Rules framed under section 6 of the Indian Fisheries Act. It may be conceded that the legislative power is certainly distinct and different from proprietary right and conferment of such power does not by itself carry with it or affect the ownership of the subject-matter in regard to which such power is exercised. In *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia*[1], one of the questions before the Judicial Committee of the Privy Council was whether section 91 of British North America Act, 1867 conveyed to the Dominion of Canada any proprietary right in relation to fishery. The answer was in the negative. It was held that section 91 did not convey to the Dominion any proprietary rights in fisheries which had previously wested either in the Provinces or in individuals, although the legislative jurisdiction conferred by section 91 upon the Dominion Legislature enabled it to affect those rights to an unlimited extent short of transferring them to others. Observed Lord Herschell speaking for the Board :

> "It must also be borne in mind that there is a broad distinction between proprietary rights and legislative jurisdiction. The fact that such jurisdiction in respect of a particular subject-matter is conferred on the Dominion Legislature, for example, affords no evidence that any proprietary rights with respect to it were transferred to the Dominion. There is no presumption that because legislative jurisdiction was vested in the Dominion Parliament proprietary rights were transferred to it. The Dominion of Canada was called into existence by the British North America Act, 1867. Whatever proprietary rights were at the time of the passing of that Act possessed by the Provinces remain vested in them except such as are by any of its express enactments transferred to the Dominion of Canada ....Their Lordships have already noticed the distinction which must be borne in mind between rights of property and legislative jurisdiction. It was the latter only which was conferred under the heading, 'Sea-Coast and Inland Fisheries' in section 91. Whatever proprietary rights in relation to fisheries were previously vested in private individuals or in the Provinces respectively remained untouched by that enactment. Whatever grants might previously have been lawfully made by the Provinces in virtue of their proprietary rights could lawfully be made after that enactment came into force. At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to certain extent enable the Legislature so empowered to affect proprietary rights .... If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that in their Lordships' opinion is not an exercise of the legislative jurisdiction conferred by section 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which had, by the British North America Act, been left to the Provinces and not vested in it."

But I do not see how the distinction between legislative jurisdiction and proprietary rights as applied to Article 298 advances the petitioners' claim that the chank fishery in Sivaganga waters has vested in the Union Government under Article 297. I have already referred to Article 294 the effect of which clearly is that the properties, which had belonged to the Provincial Governments, would after the commencement of the Constitution stand vested in the respective succeeding State Government subject to certain exceptions and adjustments which are not relevant here. Article 294 is not made subject to the other provisions of the Constitution. The question will, therefore, arise whether, notwithstanding the terms of Article 294 not made subject to any other provision in the Constitution, the intention of Article 297 is to transfer and vest in the Union Government, any proprietary rights in the subjects mentioned therein which had previously vested in the Provincial Governments, and, after the commencement of the Constitution, stood, by Article 294, transferred to the succeeding State Government. It, however, seems to me that it is unnecessary for the purpose of this case to deal with and decide this question, as in any case

1. L.R. (1898) A.C. 700 (7,09710).

I think chank fisheries are not within the ambit of Article 297. What it vests in the Union is what underlies the ocean within the territorial waters of India and not the territorial waters themselves. For the purpose of the vesting under this Article, the dividing line appears to be between the bed of the ocean and the waters above it. What does not underlie the bed of the ocean is in my opinion clearly, outside the purview of Article 297. Chanks cannot, I think, in any sense, be regarded as underlying the bed of the sea but are fish gathered or taken not from underneath the bed but from the sea bed. Precisely this view, if I may say so with respect, of Article 297, was expressed by Rajamannar, C.J., and Venkatarama Ayyar, J., in *A.S.S.S.V.N. & Co.* v. *The State of Madras*[1] which I have already noticed in this judgment in another connection. One of the arguments the learned Judges had to deal with was that under Article 297, the territorial waters had come to be vested in the Union and that the notice issued by the State Government after the commencement of the Constitution terminating the lease there was beyond the competence of the Madras State. Rejecting the argument they held :

> "The correct position is that the property having already vested in the Government they are entitled to take all steps which owners of properties are entitled to take wherever the properties might be situate and the notice dated 13th March, 1951, is within their rights as owners. And, further, there is no warrant for the contention that under the Constitution the territorial waters vest in the Union..........Under this provision (Article 297) what vests in the Union is the bed of the sea beneath the territorial waters and not the waters themselves and in law the two do not stand in the same position. The sea bed belongs to the littoral State absolutely in the same manner as its lands. It has the fullest dominion over it ; it alone is entitled to the minerals therein, and it is entitled to construct tunnels thereunder..............The territorial waters of a State, however, are unlike the sea bed, subject to certain rights in favour of other nations such as peaceful navigation and that is the reason why writers on International Law, are, as already seen, not agreed whether rights of the littoral State over those waters are in the nature of dominion or imperium. Therefore, it cannot be said that Article 297 which vests sea beds in the Union Government has also the effect of vesting territorial waters in them..............As regards the territorial waters, therefore, the position under the Constitution remains what it was under the Government of India Act."

No doubt having said all that, the learned Judges were of the opinion that even if they came to a different conclusion on the point, they would still hold that Entry 21 in the State List was sufficient to clothe the State Legislature with powers to enact laws in respect of fisheries in territorial waters, notwithstanding that they vested in the Union as observed in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia*[2] and on this principle it was sufficient to say that the power to legislate on fisheries in the territorial waters was granted to the State Government. Nevertheless I think that what the Bench observed was clearly an expression of its opinion as to the scope of ambit of Article 297. I hold, therefore, that the chank fishery in the territorial waters of Sivaganga is not by virtue of Article 297 vested in the Union Government but continues to be the exclusive property of the State Government, that as its proprietor it is competent for it to grant the lease of the right to fish chanks in those waters in favour of the second respondent and that the petitioners have no common or other right to fish chanks in the waters or to question the lease.

The petitions fail and they are dismissed with costs. Counsel's fee Rs. 100 in each of the petitions to be equally divided between the respondents.

V.S. *Petitions dismissed.*

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1. (1953) 2 M.L.J. 587 (589) : I.L.R. (1953) Mad. 1175.

2. L.R. (1898) A.C. 700.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

T. S. Srinivasan .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), section 16 (3)—Hindu Undivided Family—Transfer of Assets—Assessee, Kartha—Division in status by a deed of partition—Subsequent allotment of shares to wife and minor daughters on eve of partition—No direct or indirect transfer of assets involved.

Hindu Law—Joint Hindu family—Partition—Division in status—Property still belongs to group of individuals until division by metes and bounds.

The assessee, *Kartha* of a Hindu undivided family executed a deed on 7th December, 1957, whereunder he purported to become divided in status with his minor son and registered the same on 21st February, 1958. The assessee allotted under the partition thousand shares in a company, to his wife and five hundred shares each to two of his minor daughters, instructing the company in which the shares were held to alter the names accordingly. On 27th March, 1958, the assessee intimated the Income-tax Officer of this partition by means of a letter enclosing a copy of the deed and a schedule showing the allotment of properties. An order under section 25-A of the Income-tax Act was passed. For the assessment year 1959-60 the assessee filed a return as an individual. The Officer held that there was transfer of property after a declaration of the division in status and therefore under section 16 (3) of Act included the dividend income in his assessment. The Appellate Authority allowed the appeal preferred be the assessee by holding the allotment of shares to the lady members of the family was effected by the Hindu undivided family, on the eve of its disruption and that no transfer was involved. On appeal by the Department, the Tribunal upheld the contention of the Department that the shares had become a separate property of the assessee on 7th December, 1957, and the transfer effected subsequently would be hit by section 16 (3) of the Act. On a Reference under section 66 (1) of the Act,

Held, the allocation of properties to members of the family on a partition of a Hindu undivided family does not amount to a transfer direct or indirect so as to attract the application of section 16 (3) of the Act.

Where there is a severance in status in a Hindu undivided family till the properties of the family are reduced to the individual ownership of the several members of the family entitled thereto, the properties still belong to the group of individuals each of whom has only a definite share in those properties. Solely because division in status had taken place, it does not follow that the properties standing in the name of the one or the other member of the family became his individual property, so that, if there is a subsequent allocation of those items among the members of family, one can postulate a valid transfer by one member to another.

Held on facts, the sequence of events namely the division in 1957, the registration of the document in February, 1958, the letter of March, 1958, by which the assessee intimated the Officer of the partition enclosing a copy of the deed and schedule showing the allotment of properties, the subsequent order under section 25-A of the Act, the intimation to the company to transfer the shares, the acceptance of the return by the Gift Tax Officer in January, 1959 and the submission by his wife of her individual return for income-tax in respect of the shares, in March, 1959, belie the contention of the Department that the claim of the assessee was an after-thought.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66 (1) of the Indian Income-tax Act, 1922 (XI of 1922), in R.A. No. 563 of 1961-62 (I.T.A. No. 6383 of 1960-61).

V. K. Thiruvenkatachari for *S. Swaminathan* and *K. Ramagopal*, for Appellant.

V. Balasubrahmanyam, Special Counsel for Income-tax on behalf of the Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The assessee was the *kartha* of a Hindu undivided family and was assessed as such in the previous assessment years. On 7th December, 1957, a document was executed, whereunder the assessee purported to become divided in status. The only other member of the joint Hindu family was, at the material date, his minor son. This document was registered on 21st February, 1958. On that date, the assessee wrote, to various companies, in which the family held shares, instructing the companies to alter the name of the owner on the books of the com-

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*Tax Case No. 179 of 1962 (Ref. No. 103 of 1962). 1st February, 1965.

panies in respect of those shares according to the mode of division entered into on partition. The family owned 3,293 shares in Messrs. Southern Roadways (P.), Ltd. Of these, 1,000 shares were transferred to the wife of the assessee and 500 shares to each of his two minor daughters. The company, in due course, registered the transfer in its books.

On 27th March, 1958, the assessee intimated the Income-tax Officer of the division that had taken place in the family, and after an inquiry, the Income-tax Officer made an order under section 25-A of the Income-tax Act. For the assessment year 1959-60 the accounting year ending with 31st March, 1959, the assessee filed a return in his status as an individual. By this date however, a second son had been born to the assessee, with the result that, in respect of the property in the shape of shares which fell to the share of the assessee on the date of partition referred to, a new Hindu undivided family consisting of the assessee and his second son came into existence. The income from the shares allotted to the assessee at the partition was accordingly claimed to be the income of this new Hindu undivided family. In respect of the 2,000 shares which had been given to the wife and two minor daughters of the assessee at the time of partition, the assessee claimed that the dividend income therefrom was not assessable in his hands. The Income-tax Officer, however, thought that, by reason of the absence of any reference in the document of partition to the allotment of certain shares to the wife and the minor daughters and by reason of the further fact that the assessee's instructions to transfer the ownership of those shares were made only on 21st February, 1958, that is, subsequent to the partition on 7th December, 1957, there was a transfer of the property after a declaration of the division in status, and that, therefore, the transfer of these shares had been effected by the assessee as an individual. He accordingly invoked section 16 (3) of the Income-tax Act and proceeded to include the dividend income in respect of these 2,000 shares and the interest thereon in the income of the assessee as an individual. The assessee appealed to the Appellate Assistant Commissioner. He pointed out that the so-called transfer of the shares to the lady members of the family was effected by the Hindu undivided family on the eve of its disruption, and that this fact had been accepted by the Gift Tax Officer, also in the gift tax assessment. The Appellate Assistant Commissioner accepted this contention and directed deletion of the sum included by the Income-tax Officer.

The Department carried a further appeal to the Tribunal. The contention of the Department was that these shares had become the separate property of the assessee on 7th December, 1957, and the transfer effected subsequent to the date of the partition could only be of the property of the individual. The Tribunal accepted this contention and held that the Appellate Assistant Commissioner was in error in his view that section 16 (3) of the Act did not apply, and allowed the appeal of the Department.

On the application of the assessee under section 66 (1) of the Act, the following question stands referred to us :

"Whether on the facts the inclusion of Rs. 59,758 representing the gross dividend and the sum of Rs. 2,496 representing the interest on the dividend amount in respect of 1,000 shares belonging to the assessee's wife and 500 shares each to the assessee's minor daughters in the total income of the assessee under section 16 (3) was lawful."

Section 16 (3) of the Act, in so far as it is material, reads thus :

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(*a*) so much of the income of a wife or minor child of such individual as arises directly or indirectly...

....

(iii) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart ; or

(iv) for assets transferred directly or indirectly to the minor child, not being a married daughter, by such individual otherwise than for adequate consideration."

It is well recognised that the object of this provision is to circumvent the attempts of assessees to place properties belonging to them nominally in the names of members of the assessee's family, and except in the circumstances provided for in the section, the income from the properties so transferred is treated for the purpose of levy of income-tax as the income of the individual himself. It is obviously a question of fact to be determined in any instant case, whether a transaction is hit by this section. The basis, upon which the Tribunal proceeded in the present case, is that, on the date of the partition, the entirety of 3,293 shares in Messrs. Southern Roadways (P.), Ltd., had become allotted to the assessee, and, it was only by a subsequent act of his, 1,000 shares were transferred to the assessee's wife and 500 each to the assessee's two minor daughters. The Tribunal thus thought that there was a transfer by the assessee of his individual property, and, since it was not excluded by the relevant part of section 16 (3), the income therefrom had to be included in the total income of the assessee. The Tribunal declined to accept the contention of the assessee that the so-called transfer was contemporaneous with the division in the family and that this fact was brought to the notice of the Income-tax Officer by means of a tabular statement showing the allocation of properties which was filed before the Income-tax Officer on the date when the disruption of the Hindu undivided family was brought to his notice. It virtually rested its conclusion, in denying the claim of the assessee, on the fact that in the deed of division no particulars of allocation were mentioned. The deed of division merely purported to say that the assessee and his son had become divided in status from each other with effect from 7th December, 1957. Along with the letter dated 27th March, 1958, which the assessee addressed to the Income-tax Officer informing him that the Hindu undivided family of which the assessee had hitherto been the *Kartha* had ceased to exist, a copy of the deed of partition and a schedule were sent. This schedule purported to set out the mode of division of the properties. Before the Tribunal, this fact was urged by learned Counsel for the assessee who stated that a tabular statement had been filed before the Income-tax Officer. The Tribunal did not examine whether or not this tabular statement represented the mode of division effected at the time of partition. It did not even call for this tabular statement. In the Statement of the Case also, the Tribunal records :

"Along with this letter, a copy of the deed to evidence division in the status dated 7th December, 1957 was enclosed. A schedule, a copy of which is annexure 'A' and forms part of the case, was also stated to have been enclosed."

It is unfortunate that, when the entire case of the assessee hinged upon this particular document, *i.e.*, the schedule, the Tribunal fought shy of examining the question as to when this document came into existence: It was apparently not even inclined to believe that this schedule was enclosed to the letter referred to. Since a copy of the schedule, however, forms part of the case according to the Statement of the Case by the Tribunal, we asked learned Counsel for the Department to examine the records and inform us, whether this schedule was in fact submitted to the Income-tax Officer. Mr. V. Balasubrahmanyam confirmed the statement of the assessee that that schedule was really submitted and it is among the records.

We have no doubt in our minds that this schedule represents an allocation of the properties among the various members of the family as an incident to the partition. We are satisfied that, on the date of the partition, it was decided among the members of the family that, of 3,293 shares in Messrs. Southern Roadways (P.), Ltd., 1,293 were to be allotted to the assessee, 1,000 to his wife and 500 to each of his two minor daughters. This is the only item of property in which the minor son of the assessee was not given a share. But, of course, he was given adequate shares in all the remaining properties of the family. If, therefore, the allotment of the shares to the wife and the two minor daughters, was contemporaneous with the partition, would it be a case of transfer of assets directly or indirectly by an individual which will come within the mischief of section 16 (3) of the Act ?

The Tribunal observed, without really any material to support it, that the claim of the assessee is an after-thought. If this observation has any meaning, it

presumably suggests that the assessee thought of making this claim only at the time of the submission of his individual return. The sequence of the dates clearly proves the contrary. On 7th December, 1957, there was a division in status. The document in that regard was registered on 21st February, 1958. On that very day, the assessee addressed letters to the several companies to record certain shares, (the numbers of which were presumably furnished) in the names of his minor son, his wife and his two minor daughters. It has to be remembered that, even when the family was joint, these shares stood in the name of the assessee on the books of the company. It could hardly be otherwise for the assessee was the *Kartha* of the family. On 27th March, 1958, the assessee addressed a letter to the Income-tax Officer for the purpose of section 25-A of the Act and attached thereto a schedule which set out the mode of division of the various items of properties. It may be stated that, in order to effectively put an end to any future assessment of the Hindu undivided family, the assessee has to establish, to the satisfaction of the Income-tax Officer, that the property of the family, had been actually divided by metes and bounds among all the members entitled thereto. It was, therefore, essential that the exact mode of division had to be communicated to the Income-tax Officer. On 16th February, 1959, an order under section 25-A was passed. On 31st January, 1959, the Wealth-tax Officer passed an order accepting the return of the assessee. On 30th March, 1959, the wife of the assessee had submitted her individual return for income-tax and had been assessed in respect of 1,000 shares which had become her property as a result of the partition. In respect of the shares the Hindu undivided family as such had been assessed under the Gifts Tax Act for the assessment year 1958-59, the return for which was filed on 26th March, 1959. It was after all these proceedings initiated had come to an end that the assessee had submitted his own return for assessment year 1959-60. It can hardly be said that, for the first time on this occasion, the assessee thought of a device of pleading allocation of the properties at the partition. The dates are significant and show that this allocation should have been made even on 7th December, 1957, and the schedule submitted to the Income-tax Officer on 27th March, 1958, represents a transaction which was contemporaneous with the partition in the family.

The view taken by the Tribunal that as a result of severance in status the entirety of these 3,293 shares had become the property of the assessee and that there was a transfer subsequently by the assessee to his wife and two daughters finds no support from the facts. How the Tribunal came to the conclusion may be briefly indicated.

The Income-tax Officer overlooked the fact that a schedule had been submitted even on 27th March, 1958 and asked the assessee to furnish replies to certain questions. On the 11th of November, 1958, the assessee submitted replies to the questionnaire sent to him. Herein he stated that all the assets and liabilities relating to the family had been completely partitioned among the members of the family in definite proportions as per the statement enclosed. While referring to the shares in Messrs. Southern Roadways (P.), Ltd., he stated :

"I have transferred 1,000 shares to my wife and 500 shares each to my two daughters."

It is this statement that has been relied upon by the Department to hold that there was a transfer by the assessee in his individual capacity to his wife and two daughters. We do not agree with the Department or Tribunal that this reply given by the assessee on the 11th November, 1958 can be read isolated from the earlier correspondence or the earlier statements made by the assessee. Indeed, when the assessee stated "in respect of the shares held by me in Southern Roadways (P.), Ltd.", it did really mean that the shares had been held by him as the *kartha* of the undivided family. Factually also, those shares stood in the name of the assessee, and this statement that he had transferred 1,000 shares read in the context is only an affirmance of what has taken place at the partition, and nothing more.

Where there is a severence in status in a Hindu undivided family till the properties of the family are reduced to the individual ownership of the several members of the family entitled thereto, the properties still belong to the group of individuals each

of whom has only a definite share in those properties. The actual division of the properties of the family may take, in some cases, a considerable length of time. It is not unusual to find that the properties of the Hindu undivided family stand in the name of the one or other member of the family. (Solely because division in status had taken place, it does not follow that the properties standing in the name of the one or the other member of the family became his individual property, so that, if there is a subsequent allocation of those items among the members of the family, one can postulate a valid transfer by one member to another.)

We may refer to a decision of the Supreme Court, *Commissioner of Income-tax* v. *Stremann*[1]. The appeal arose out of a decision of this Court rendered in an income-tax reference where the question was whether a transfer of assets to three minor children attracted the provisions of section 16 (3) of the Income-tax Act. In that case, the father blended his self-acquired property with the ancestral property and purported to partition the entire property among his sons. This Court upheld the right of a father to so throw into the hotchpot his separate property and took the view that it became joint family property by such an act. This Court further took the view that the process of division and allocation of joint family properties at a family partition did not imply a transfer which could be brought within the scope of section 16 (3) of the Income-tax Act. Their Lordships of the Supreme Court observe :

"When instructions are given that the self-acquired property is to be treated as joint family property, in our opinion, at that moment, the property assumes the character of joint family property."

Their Lordships also agreed with the view expressed by this Court that whether there was an earlier blending of the self-acquired properties of the assessee with the ancestral joint property or not

"it certainly was unequivocal that the properties dealt with at the partition were treated by the volition of the assessee as the properties available for partition between the members of the joint family."

They also agreed with this Court that there was no direct or indirect transfer of the assets to the minor children in the circumstances of that case.

It seems to us that this decision fully applies in so far as the latter part is concerned. It was never in dispute that these shares were ancestral properties of the joint family consisting of the assessee and his minor son. It was at the partition that took place between the members of the joint family that certain shares were allotted to the assessee's wife and to the two minor daughters. That such an allotment could be validly made and is not opposed to the principles of Hindu Law is beyond question. Nor, as we have found, was it a transfer of an asset of these shares after these shares had become the individual property of the assessee on allotment. As their Lordships of the Supreme Court have affirmed, the allocation of properties to various members of the family at a partition does not amount to a transfer direct or indirect, so as to attract the application of section 16 (3) of the Income-tax Act.

We accordingly answer the question in favour of the assessee. The assessee will be entitled to his costs. Counsel's fee Rs. 250.

V.S. *Answered accordingly.*

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1. (1965) 1 I.T.J. 5 : (1965) 1 S.C.J. 106.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA AYYAR, *Chief Justice*, AND MR. JUSTICE P. RAMAKRISHNAN.

Messrs. Anglo-French Textiles, Ltd., Pondicherry .. *Petitioner* *

v.

The Chief Commissioner of Pondicherry State, Pondicherry, and others .. *Respondents.*

French Labour Code. (1952), *sections* 209, 210, 211 *and* 212—*Scope and effect of—Collective labour dispute—Procedure for settlement—Order of reference or* proces-verbal *drawn up by Conciliation Board—Importance of—If conclusive as to scope of area of dispute and points at issue—Functions of Expert and of Chief Officer—Formulation of dispute—Exclusive power of Board—Construction of* proces-verbal—*Power of Expert to go beyond terms of reference.*

Constitution of India (1950), *Article* 226—Certiorari *or* mandamus—*When called for—High Court clarifying matter and points of reference—Necessity for writ.*

Under the French Labour Code, enacted by a law of French National Assembly in 1952, for application to the overseas territories of France, which continues to apply to Pondicherry even after the Pondicherry (Administration) Act, 1962, by which the jurisdiction of the Madras High Court, including its writ jurisdiction, was extended to the territory of Pondicherry, the parties to a collective dispute are required to notify to the Inspector of Labour and Social Legislation, who, thereupon, can assist the parties to arrive at a settlement, as provided in section 209 of that Code. If this procedure is not successful, the conciliation procedure has to be applied, the dispute has to be brought before the Labour Advisory Board either at the instance of one of the parties to the dispute or in the absence of such a request on the initiative of the chairman of the Board. The Board is given power to delegate its duty to the Special Conciliation Board composed of equal numbers of employer's and employees' representatives under the chairmanship of the Inspector of Labour and Social Legislation. The conciliation agreement if arrived at, signed by the parties would immediately become enforceable. If this procedure also is found unsuccessful, section 210 comes into play, and the recommendation procedure provided by the Code has to be gone through as detailed in section 211 of the Code. The Labour Conciliation Board has to draw up a record of non-conciliation described as *proces-verbal*, which means official report, proceedings or minutes of a meeting. The *proces-verbal* has nothing verbal about it and it is, on the other hand, a written and formal record of a proceeding. This in substance is a reference agreed to by the contesting parties to submit their dispute for decision to an Expert. This has to be drawn up by the Conciliation Board and has to be signed by all the parties and this should state the subject-matter of the dispute and the points to be submitted. The next stage is the appointment of the Expert who is to act upon the submission. The parties are given liberty to appoint an Expert of their choice within four days, but if they do not come to an agreement as to the appointee, the Chief Officer of the territory, *i.e.*, The Chief Commissioner, should appoint an Expert within 48 hours. The Chief Officer can only appoint the Expert, but has no power to formulate the dispute. The Expert has to give his opinion, as provided in section 212, on all matters set out in the record or *proces-verbal* and on all matters which have any bearing on the dispute.

The material document in the matter of defining the scope of the dispute before the Expert, is the *proces-verbal*, or record of non-conciliation drawn up by the Special Conciliation Board and what the Expert is required to do is to give his opinion on the matters set out on the record and such other incidental matters which might have a bearing on the dispute. The Conciliation Board has the exclusive power to define the area of the dispute, and it is that record or *proces-verbal*, which has to be looked into for appreciating the scope of the dispute and the points at issue.

Where the *proces-verbal*, which emerges finally refers only to the conditions of work of spinners in the spinning department in a Textile Mill and their work-load and wages, and the dispute as found in it, is restricted only to spinners in the spinning department, and not to any other employees in that department such as doffer boys in that department, or other workers, it cannot be extended to other workers.

Held further that as the matters had been clarified by defining the exact scope of the terms of reference, there was no need to quash the notification of the Chief Officer by *certiorari* or to give any direction by way of *mandamus*.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with Writ Petition No. 853 of 1963 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to Communication No. 14-38/63/ITLS, dated 19th June, 1963, and Decision No. 533/ITLS, dated 18th June, 1963, issued by the first respondent herein and quash the said proceedings therein etc.

*Writ Petitions Nos. 857 and 858 of 1963. 25th September, 1963.

V. Tyagarajan, M. Ramachandran and *M. A. Rajagopalan*, for Petitioner.

Government Pleader for Pondicherry (*V. S. Ramakrishnan*), *S. Mohan Kumaramangalam* for *S. Ramaswamy* and *B. Lakshminarayana Reddy*, for Respondents.

The Judgment of the Court was delivered by

Ramakrishnan, J.—Messrs. Anglo-French Textiles, Ltd., Pondicherry, is the petitioner in both these writ petitions filed under Article 226 of the Constitution. The array of respondents is the same in both the petitions. The Chief Commissioner of Pondicherry State, The Rodier Mills Labour Union (AITUC) (which we will refer to briefly as Union-1), The Rodier Mill National Workers' Union (INTUC), (Union-2) and Sri K. Ramaswamy Goundar, retired Industrial Tribunal, Madras, are the respondents 1 to 4 respectively in the two petitions. The matters in dispute are also identical, with this difference, that the relief of *certiorari* is the principal relief sought in the first petition, while in the second petition, the relief of *mandamus* is the principal relief sought. The subject-matter of the writ petitions has reference to the settlement of a collective dispute, arising within the limits of the State of Pondicherry, and to which the French Labour Code, enacted by a Law of French National Assembly in 1952 for application to the overseas territories of France, which formerly included Pondicherry, would apply. It is common ground that, even after Pondicherry became legally, a part of the Union of India, and after the jurisdiction of this High Court was extended to the said teritory by the Pondicherry (Administration) Act, 1962, the abovesaid Labour Code continues to apply to the said territory. It is also not in dispute that, after the extension of the jurisdiction of this Court by the Pondicherry (Administration) Act, 1962, to the erstwhile Pondicherry territory and after that territory became legally a part of the Indian Union, the writ jurisdiction of this Court also extends to the above territory.

On 18th June, 1963, the Chief Commissioner of Pondicherry issued a notification, under section 211 of the abovesaid Labour Code, appointing the fourth respondent, Sri K. Ramaswamy Gounder, as the Expert, to settle a collective dispute which had arisen in the meantime between the petitioner-mill and its workers. Prior to that, the dispute was found to be not capable of settlement either by the settlement procedure with the assistance of the Inspector of Labour and Social Legislation (*vide* section 209, first part of the Labour Code) or the conciliation procedure before the Labour Advisory Board (*vide* section 209, second part of the Labour Code). Section 210 of the Code provides that, if the conciliation procedure was unsuccessful, the recommendation procedure outlined in section 211 of the Code should be followed. This involves the appointment of an Expert by the Chief Officer of the territory, if the parties themselves fail to nominate an Expert.

After setting out the various statutory orders, giving him the necessary powers under the Labour Code of 1952, the notification of the Chief Commissioner reads :

As per the report of the non-conciliation of the Consultative Committee of Labour, dated 13th May, 1963, and the note of the 30th May, 1963, in respect of the dispute between the Management of the Anglo-French Textile Mills and the Unions of workers of this mill, regarding the fixation of wages and conditions of work for the workers in the spinning section of the Anglo-French Textiles, Limited.

Considering that the parties have not reached an agreement, for the designation of an Expert, and consequently there is no need to designate him, decides :

Article 1 : Mr. K. Ramaswamy Goundar........is designated an Expert to settle the dispute existing between the Management and the Anglo-French Textiles, Limited, and the Syndicate of Workers of the Mill.

The contentions of the petitioner-mills, as set out in the affidavit to the writ petitions are these. The collective disputes which arose in this case was between the spinners of the petitioner-mill and the Management, relating to the wages and work-loads of spinners who are described as two-side spinners. A word of explanation might be necessary, at this stage, of the term *two-side spinners*. It is a matter of common knowledge that, in a textile mill, spindles are arranged on the two sides of frame, and it is alleged to have been the practice in the case of

Rodier Mills, that, in case of threads upto certain counts of texture, one spinner is treated as sufficient for attending to the spindles on the two-sides of a frame. Such workers are called *two-side spinners*. The affidavit goes on to say that it was only regarding this dispute, that the mill-management wrote to the Inspector of Labour and Social Legislation on 9th May, 1963, seeking his intervention, under section 209 of the Code, to bring about a settlement. When it was found that the Inspector could not bring about a settlement, the next stage of the procedure was the one in the second part of section 209, which involved the bringing up of the dispute before the Labour Advisory Board, either at the request of one of the parties, or, if no such request was made, on the initiative of the Chairman of the said Board. The Labour Advisory Board may, if it deems it necessary, delegate this duty to a Special Conciliation Board composed of an equal number of employers' and employees' representatives, and under the chairmanship of the Inspector of Labour and Social Legislation.

The correspondence that passed between the mill-management and the Inspector of Labour clearly shows, that the dispute was confined in the initial stage, to this narrow ground. The petitioners' grievance is that, the dispute, referred by the Chief Commissioner of Pondicherry to the Expert for decision, as per the terms of the notification extracted above, is of much wider import ; it will seem to comprehend the fixation of wages and conditions of work, for all the workers in the Spinning section of the Anglo-French Textiles, Ltd. Now, it was pointed out that the Spinning section in the petitioner-mill, comprises 17 categories of workers, of whom the spinners are only one category. It was urged that the scope of the dispute had thus become unduly wide, because of the erroneous notification issued by the Chief Commissioner. It was pointed out that, when the matter came up before the Expert, a reading of the Government Order is alleged to have given him the impression that he would have to go into the wages and work-loads of all the workers, in the various categories above-mentioned in the Spinning department, and that he was not required to confine himself to spinners alone as contended by the petitioner. It was urged by the petitioner that Union-2 (respondent 3) raised the point before the Expert that the dispute related only to two-side spinners, but the Expert stated that he had no other go but to act according to the terms of the notification and enlarge the enquiry accordingly, so as to cover all the workers in the Spinning department. It was pointed out in the affidavit of the petitioner that it was never the intention to include the workers like the doffers in the Spinning department within the scope of the enquiry. There was also a class of workers in the Spinning department, namely, the Yarn Conditioning workers, and the dispute between them and the Management had been referred to another Expert S. Siva, President, Tribunal Superieur de Appel, Pondicherry, and is awaiting settlement.

The petitioner's grievance is that the reference in the notification went far beyond the restricted scope of the enquiry as stated above, and therefore it is necessary to confine the enquiry to its proper limits by an appropriate writ issued by this Court, either of *certiorari* or of *mandamus*. It was also pointed out by the petitioner in his affidavit that Union 2, the third respondent, had admitted before the Expert in their memorandum, that the dispute was restricted in the manner aforesaid, but when the Expert was inclined to hold, according to the terms of the notification, that all the workers in the Spinning department fell within the scope of his enquiry, the Union had said that they had no objection to that course. Thereafter the petitioner wrote to the Chief Commissioner for amending the reference, but no reply was received from him.

So far as Union-2 (the third respondent) is concerned, in their counter-affidavit, they stated that they agreed with the petitioner, that the dispute before the Expert related only to wages and work-loads of the spinners in the Spinning department, and that this Union was concerned only with the wages and work-loads of the spinners in the Spinning department who are called upon to do two-side spinning, and that the record of non-conciliation drawn up by the Labour Advisory Board under

section 211 of the Code would govern the matter. They also adopted the view that accordingly proper directions would have to go both to the Government of Pondicherry and the Expert to confine the enquiry as stated above.

The Chief Commissioner of Pondicherry, the first respondent in both the petitions, has stated in his counter-affidavit that mention has been made about the records of non-conciliation drawn up and signed by the parties, a copy of which had been forwarded to the Expert, and it was, therefore, open to the parties to bring to the notice of the Expert the relevant provisions of the Labour Code and it was for the Expert to decide the scope of the reference in accordance with law. According to the first respondent, it was purely within the jurisdiction of the Expert to decide as to the scope and compass of the dispute and give his opinion and that the administration had done what was ordained under the Code. The counter-affidavit of the first respondent states further that once the matter is referred to the Expert, the question is *sub judice* and the administration cannot amend, add or substract, which, if otherwise allowed, would amount to drafting of the record of non-conciliation and reference by the Government, which procedure is not admissible under the provisions of the Code.

Union-1 in its counter-affidavit adopted the position which it took before the Expert, before whom, it had made a statement of their claim. It referred to the principles contained in the recommendation of the Wage Board for Cotton Textile Industry and stated that these principles should be adopted for fixation of wages as well as work-load. It also urged that the enquiry of the Expert should include the work-loads and wages of doffer boys in the Spinning department because the Management had unauthorisedly increased their work-load, contrary to the Arbitration Award, dated 24th November, 1955. According to the *Coimbatore Agreement*, which affected other textile mills in the Madras State, the doffer boys in the other textile mills are getting higher wages for lesser work-load, when compared with the petitioner-mill. So this Union urged that the Expert should also go into the question of work-load and wages of spinners in the Spinning department, and also the doffer boys in the Spinning department.

The petitioner-mills in their reply-affidavit, denied this claim that the work-load and wages of the doffer boys should be included in the enquiry by the Expert. In conclusion they stated that even if it were to be held that the dispute comprehended the wages and work-load of the spinners in the Spinning department, besides the dispute about the two-side spinning, it would never include other categories of workers in the Spinning department other than spinners.

The points for decision in these writ petitions are: (i) What is the scope of the collective labour dispute which has been referred to the Expert, the fourth respondent in these petitions, for making his recommendation, after conducting the necessary enquiry under the Act ? ; (ii) Has the notification, embodying the decision of the Government No. 533-ITLS, dated 18th June, 1963, in any way gone beyond the legal limits of the scope of the reference, and if so, in what respects ; and (iii) What is the relief, if any, to which the petitioner is entitled ?

We will briefly touch upon the relevant provisions of the French Labour Code enacted according to the law of 1952, in the matter of settlement of collective disputes. Under section 209, the parties to a collective dispute are required to notify to the Inspector of Labour and Social Legislation, who, thereupon, can assist the parties in arriving at a settlement. If this procedure is not successful, the next stage is the conciliation procedure. For this purpose, as envisaged in section 209, either at the request of one of the parties, or, if no such request is made on the initiative of the Chairman of the Labour Advisory Board, the collective labour dispute shall be brought before the Board, for the purpose of conciliation. This Board can delegate its duty to Special Conciliation Board composed of equal number of employer's and employees' representatives under the chairmanship of the Inspector of Labour and Social Legislation. The conciliation agreement signed by the parties shall be immediately enforceable. The third stage (section 210) refers to

a situation where the conciliation procedure has been found unsuccessful, and, in such a case, the French Labour Code visualises what is described as the recommendation procedure. Section 211 of the Code gives the details of the recommendation procedure to be followed. Where an attempt at conciliation before the Special Conciliation Board is proved unsuccessful, the Labour Conciliation Board is required, in such a case, to draw up a record of non-conciliation.

It is necessary to pause at this stage, for clarifying a French term, *proces-verbal* which has been translated into English (*vide* translation of the *French Labour Code*) by the International Labour Office (Legislative Series, 1922) as—

"record of non-conciliation."

The term *proces-verbal* is a well-known term in French law.

Harrap's *Shorter French and English Dictionary* gives the meaning of the term as—

"official report; proceedings; minutes of a meeting."

As one writer put it tersely, the word—

"*Proces-verbal* in French law has nothing verbal about it."

On the other hand, it means a written and formal record of a proceeding.

The Conciliation Board is required, therefore, to draw up a formal record of the proceedings before it, and this has to be signed by all the parties, and this record should state the subject-matter of the dispute and the points to be submitted to the recommendation procedure. To put it in a different language, *proces-verbal* in the French Labour Code, is in substance a reference agreed to by the contesting parties, to submit their dispute for decision to an Expert.

The next stage relates to the appointment of the Expert, who is to act, upon the submission thus made to the recommendation procedure. Section 211 of the Code gives the liberty to the parties themselves to appoint an expert, if they agree, on his choice, but they are given a time-limit of four days. In the event of their inability to do so, the Chief Officer of the territory (the Chief Commissioner in the present case) should appoint an Expert within 48 hours. Section 211 proceeds to give thereafter the qualifications of the Expert, whose name shall be included in advance every year in a panel.

It will thus be seen that the power of the Chief Officer of the territory will be confined only to appoint the Expert, for the settlement of the dispute, which has been referred by the Conciliation Board, for settlement by recommendation procedure. He himself cannot formulate the dispute. Under section 212, the Expert is required to give his opinion on all the matters set out in the record of non-conciliation (*proces-verbal*), and on all matters which have any bearing on the dispute. Section 213 gives the power to the Expert for the purpose of obtaining information and making his enquiry. He should observe the professional secrecy, and the parties are called upon to submit a memorandum and any other observations which they deem necessary. Section 214 of the Code requires the Expert to make the report with the reasons, and this report shall conclude with a proposed settlement of the points at issue, taking the form of a recommendation. It is the last mentioned provision that has perhaps led to the description of the stage as the recommendation procedure. Under section 215, at the end of the time-limit prescribed from the date of communication of the report to the parties, the recommendations shall become enforceable. There is also a provision for appeal to the Central Arbitration Court and for stay. Section 216 of the Code restricts the scope of the appeal to the allegations that the recommendations are *ultra vires* or contrary to law.

It would appear from the foregoing that, in the matter of defining the scope of the dispute before the Expert, the material document is the *proces-verbal* or the record of non-conciliation drawn up by the Special Conciliation Board. The function of the Chief Commissioner is only to appoint the Expert, when the parties

have failed to agree about him. But on what the Expert is required to give his opinion, is confined to the matters set out in the *proces-verbal*, or the record of non-conciliation and also on such other incidental matters which might have a bearing on the dispute. Article 212 of the French Code reads :

"L'expert devra se prononcer sur tous les objects determines par le proces-verbal de non-conciliation et sur tous autres qui pourraient etre en relation avec le differend en cours."

Note the use of the words.

"objets determines par le proces-verbal de non-conciliation."

Actually, the French verb *determiner* has the meaning

"to fix, settle."

In other words, it has the same meaning as the English word *to determine*. The English translation supplied to us by translating the words *determiner*, as *set out*, uses a weaker expression. The Labour Code in the original French Language, brings out with far more force and precision, the exclusive power of the Conciliation Board to define the area of the dispute, by using the word *determiner*.

No doubt, as contended by the petitioner in the initial stages, when the President of the Union-2 wrote to the Inspector of Labour asking him to make a reference to the Labour Advisory Board, the dispute was described as due to the *imposition of a work-load of one man for two sides on* 12 *counts thread* (*vide* letter, dated 9th May, 1963 of the President of Union-2 to the Inspector of Labour). Thereupon, on 10th May, 1963, the Inspector wrote to the Management of the mills to offer their remarks. The reply of the Mill Management on 10th May, 1963, to the Inspector of Labour refers to the subject of two-side spinning, and the mill manager stated that he had no objection to that subject being placed before the Consultative Commission. Thereafter, on 13th May, 1963, the Consultative Commission of Labour, presided over by the Inspector of Labour and Social Legislation, the representatives of the mill and the workers, as contemplated in the Code, entered on their duties to effect a conciliation of the dispute. We have been shown no authority to hold that the dispute for the purpose of this case, should be confined solely to the dispute that was under discussion, when the matter came up before the Inspector of Labour under section 209 of the French Labour Code. The *proces-verbal* drawn up at the end of the discussion, which took place on 13th May, 1963, gives the scope of the dispute, as it emerged finally at the time of the conciliation proceedings. This *proces-verbal* has got to be carefully studied, for answering the points raised for decision in this case. Sri Balakrishnan, representative of the second Union (INTUC), made a statement, which has been summarised at the beginning in the *proces-verbal*. The gist of it is this :

"According to the provisions of the Arbitration Award of 24th November, 1955 (Chakravarti Award), if new machines have to be introduced (in the Spinning department—because at the outset the dispute has arisen in the Spinning department), the parties should previously have arrived at an arrangement on the conditions of work and wages of the workers on these machines: The Rodier Mill has introduced new machines in the Spinning department and also new conditions of work and new wage-rates without fixing them earlier..........

For spinning counts from 8 to 40s each worker has to attend to 400 spindles. (The word 'worker' at this stage has a reference only to spinners, because it is not alleged that doffer boys are allowed to work on 400 spindles)."

The complaint of Sri Balakrishnan proceeded to allege that these workers (meaning spinners) were asked to attend to other work also. According to the Arbitration Award of 24th November, 1955, the conditions of work for the workers in the new machines should be fixed at 150 spindles for counts upto 10s, and by ascending grades upto 400 spindles for counts upto 30s. These would have reference again only to spinners, when we take into account the number of spindles mentioned. Sri Balakrishnan concluded his statement by saying that the spinners should not be compelled to attend to other jobs and the wages should be fixed with retrospective effect. There can be no doubt that this part of the statement of the INTUC mentioned in the *proces-verbal*, refers only to the conditions of work of spinners in

the Spinning department and their work-load and wages. The *proces-verbal* then proceeds to mention the contentions of Sri K. S. Ramani, who appeared for the Management. He referred to the conditions of the work of spinners as set out in the *Chakravarthi Award* and their basic wages. He denied that the Management has introduced new machines and added that certain improvements were carried out to the existing machines, which are called *High Draft Frames*. In such frames, the *worker*, which would mean only the spinner, has to look after two sides. This arrangement has been in force for over five years; and a *worker* (which could in the context, refer only to the spinner) attending to two sides received a wage of Rupees forty, whereas the wage in the Arbitration Award was only Rs. 32-50 nP. The Management, thereafter, defended their action in fixing the wage and work-load for the spinners in the Spinning department. To this contention, Sri Balakrishnan of the INTUC gave a reply. Sri Ramani, on behalf of the Management, made a further statement, which has been summarised in the *proces-verbal*. These two statements have reference to wages and work-loads of only spinners in the Spinning department. There is no reference at all to other types of workers falling within any of the other 17 categories in the Spinning department, and which include doffer boys. At this stage, according to the *proces-verbal*, the parties made a request for some time to discuss the matter between themselves, to arrive at an amicable settlement, and in case of failure, they would notify the Consulative Commission of Labour.

The above gives the gist of the proceedings of the 13th May, 1963, as found in the *proces-verbal*, and it would show that the dispute was restricted only to spinners in the Spinning department, and not to any other employees.

The *proces-verbal* then adds a note, dated 30th May, 1963, which is also signed by the parties before it. The gist of the note may now be set out:

"During the meeting of the Consultative Commission of Labour held on 13th May, 1963, at the office and presided over by the Inspector of Labour and Social Legislation for conciliating the Management and the Rodier Mill National Workers' Union, affiliated to the INTUC *in the matter of the fixation of conditions of work and wages in the Spinning department of the Anglo-French Textile Mills*, the parties have requested for time to discuss the question directly between themselves to explore the possibilities of a settlement. They have now both notified the result of their discussion to the Commission.

By letter, dated 15th May, 1963, the Management and Rodier Mill National Workers' Union have notified the Commission that it has not been possible to arrive at a settlement and pray that as a consequence a record of non-conciliation may be drawn up for submission of the matter to the Expert.

The Syndicat des ouvriers de l'usine Rodier, Modeliarpeth by their letter, dated 14th May, 1963, has also addressed the Consultative Commission on the same matter. They have been invited on 15th May, 1963, to join the discussions being held on this matter between the Management and the Rodier Mill National Workers' Union. By their letter, dated 29th May, 1963, the *Syndicat des ouvriers de l'usine Roudier* have notified that it has not been possible to arrive at a settlement with the Management and requested that this matter may be submitted to the Expert.

As no settlement between themselves was possible for the parties, further conciliation will be of no use. Besides, the members of the Consultative Commission of Labour are requested to give their consent for submitting the matter to the Expert."

It is pertinent to observe that the order of the Chief Commissioner appointing the Expert has described the nature of the dispute as fixation of wages and conditions of work for *the workers in the Spinning Section* (italicised portion ours). It is the use of this general term of *workers in the Spinning Section*, without defining the category or categories in the Spinning Section involved that has led to the dispute in this case. But, as mentioned already, to understand the scope of the dispute referred to the Expert for settlement, one has to read the *proces-verbal* as a whole, and not confine oneself to what has been mentioned in the note extracted.

Here again, to be certain that there has been no mistake in the translation from the French to English, we had a look at the original note of the *proces-verbal*

in French, and we find that there is no reference to the word *workers in the* Spinning department. The language used is:

" ....au sujet de la fixation des conditions du travail et des salaires dans le department de filage de Lusine Anglo-French Textile."

When translated, it means

"In the matter of fixation of conditions of work and wages in the Spinning Department of the Anglo-French Textile Mills......."

Note that there is no reference to *workers* in the department, but mentions only *in the department.*

We have stated the result of our scrutiny of the *proces-verbal* in the foregoing paragraphs, and our scrutiny leaves no room for doubt that what was deliberated upon at the meeting on 13th May, 1963, related only to spinners in the Spinning department, and not to other workers in that department.

The subsequent paragraphs of this note refer to a letter addressed to the Consultative Commission by Union-1 on 14th May, 1963, on the *same matter* which in the context, must refer only to the matter referred to earlier and which, as discussed above, must be confined to the spinners in the Spinning department. Sri Mohan Kumaramangalam, appearing for Union-1 produced before us a copy of this letter, dated 14th May, 1963, and invited our attention to the general terms, in which it has referred to the dispute. This letter refers to the work-load in the Spinning department of Rodier Mills being contrary to the Award, dated 24th November, 1955, and suggested that the work-load and wages should be fixed in accordance with the settlement reached before the Labour Minister, Sri Bakthavatsalam. The letter mentioned that the Consultative Commission discussed this matter only with the INTUC on 13th May, 1963, for coming to a settlement, but no representation has been given to Union-1 and any settlement to which INTUC alone was a party would not solve the problem, as that Union was a minority union. Union-1 (the second respondent) requested the Labour Advisory Board to invite them also for a discussion on the work-load and wages in the Spinning department. Sri Mohan Kumaramangalam, however, frankly conceded before us that this communication would not in terms imply that Union-1 had called upon the Labour Commission to settle also the work-load and wages for other workers in the Spinning department besides the spinners. This would show that Union-1 had serious objection to the settlement between the Management and the INTUC (Union-2) without making Union-1 a party to it, as Union-1 had a majority of workers affiliated to it. Note that at this stage, no objection was raised, as regards the subject-matter of the dispute, but only as regards the representative character of the INTUC Union. But the Conciliation Board was not prepared to invite Union-1 to appear before it, but directed Union-1 to join the discussions being held at that time between the Management of the Mill and Union-2 so that they could take part in a settlement if one is arrived at. The Note proceeds to say that Union-1 by its letter, dated 29th May, 1963, had notified that they could not arrive at a settlement with the Management. They were content to leave the matter to the Expert. Thereafter the Conciliation Board drew up its record of non-conciliation. This report was signed by the parties, as required under the Code. This record of proceedings would show that, even after Union-1 sought to join the discussion before the Conciliation Board, they were not allowed to join, but were directed to take part in the discussions between the Mill and Union-2; and when Union-1 reported subsequently that they could not settle the matter, the Consultative Commission concluded its deliberations and drew up its report. While doing so, it did not extend the scope of the dispute to anything more than what had been the subject-matter of the record of the proceedings that took place at the earlier meeting on 13th May, 1963, between the representative of the Mills, and those of Union-2, which have been extracted above. For the aforesaid reasons, we are of the opinion that the material record in this case, on the basis of which the scope of the dispute had to be determined, namely, the *proces-verbal*, shows beyond any possibility of doubt, that the collective dispute referred to the Expert for his recommendation,

was with regard to the conditions of work and wages of the spinners in the Spinning department, and not of other workers in that department.

Sri Mohan Kumaramangalam, at the conclusion of the arguments, was fair enough to concede that, on a proper interpretation of the document and the records in this case, the above is the only possible conclusion to be formed. As regards the Union-2 (third respondent), they had in their counter-affidavit conceded the scope of the dispute as set out by the Management in their petitions, but at the time of the arguments, their learned Counsel preferred to adopt the contentions of Union-1, presumably, as a matter of tactics. But they must be necessarily confined to the terms of their counter-affidavit in the writ petitions.

For the aforesaid reason, we are of the opinion that the scope of the collective dispute referred to the Expert is restricted to spinners in the Spinning department, and cannot be extended to other workers in that department. As regards the relief to be granted in these petitions, we are of the opinion that no specific order quashing the notification of the Chief Commissioner of Pondicherry by way of *certiorari*, is called for, in view of our clarification above of the reference. Nor is it necessary, as a consequence, to give any direction by way of *mandamus*, because of the way in which we have clarified the terms of the reference in this judgment, for guidance, in the further disposal of the matter. We dismiss the two writ petitions, with the above observations. In the circumstances of the case, there will be no order as to costs.

P.R.N. *Petitions dismissed; Reference clarified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

Padmini Chandrasekaran .. *Appellant* *

v.

S. Somasundaram Chettiar (died) and others .. *Respondents.*

Hindu Law—Joint family—Business carried on by individual coparcener—Family business or separate business—Burden of proof—Presumption, if any—Absence of evidence showing existence of sufficient family funds available—Other members shown to be carrying on separate business of their own—Inference—Other members alleging business to be joint family business suppressing accounts and other relevant and valuable evidence—Inference—Evidence Act (I of 1872), *section* 114, *Illustration (g)—Applicability.*

There can be no presumption that a business started and conducted by a junior member of a Hindu joint family, in his own name, is not his separate business but a joint family one. Unless it can be shown that the business in the hands of a coparcener grew up from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. The question whether the business was begun or carried on with the assistance of joint family property or as a family business is a question of fact upon which the initial burden of proof lies upon those who claim a share in the business.

Under the Hindu Law, there is no presumption that a business standing in the name of any member is a joint family one even when that member is the manager of the family; it would make no difference in this respect even if the manager happens to be the father of the coparceners.

Rampershad Tewary v. *S. Doss*, 10 M.I.A. 490; *Vasudeva Rao* v. *Sakharam Rao*, A.I.R. 1928 Mad. 412; *Manilal* v. *Bai Sushila*, A.I.R. 1956 Bom. 402, distinguished and explained.

Annamalai Chetti v. *Subramaniam Chetti*, (1929) 56 M.L.J. 485 (P.C.); *Chattanatha Karayalar* v. *Ramachandra Ayyar*, (1955) 2 S.C.R. 477; *Bhuru Mal* v. *Jaganath*, (1943) 1 M.L.J. 70, followed.

Mayne's Hindu Law, 11th edition, para. 205-A, referred to.

In the absence of evidence to show that there was any sufficient surplus available to enable substantial advances being made to the member in whose name the business was being carried on and when there is evidence to show that the other members were each of them having their own separate business, there can be no basis for holding that the business is a joint family business.

It is not an inflexible rule of Hindu Law that a profit made by a member of a joint family from the enjoyment of joint property, but without detriment to the joint family, will not be his separate property.

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* Original Side Appeal Nos. 49 of 1960 and 60 of 1959. 11th December, 1963.

Lachumeswar Singh v. *ManowarHossein*, (1881) I.L.R. 19 Cal. 253 ; *Ramayya* v. *Kolanda*, I.L.R. (1940) Mad. 322 ; *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*, I.L.R. (1937) Mad. 990 ; *Manickam Chetty* v. *Kamalam*, (1937) 1 M.L.J. 95, relied on.

When the other members who claim the business as a joint family business and who are in possession of the accounts and other valuable evidence which would throw light on the matter, suppress and withhold such evidence, this would entitle the party who claims it as his own separate business to call in aid the presumption under the law that the account books, if produced, would be against the party suppressing them. The presumption enacted by the *Illustration* (*g*) to section 114 of the Evidence Act can properly be applied to such a case as it fits the facts.

Ramachandradu v. *Janakiramanna*, (1921) 13 L.W. 293 (P.C.) ; *Sandanam* v. *Somasundaram*, A.I.R. 1937 Mad. 436, referred to.

The circumstances that there has been no disruption in the joint family or that the member carrying on business had been consulting and looking up to an elder member for guidance in the conduct of the business would not and cannot make the business of the member joint family business. Nor would the mere fact that the member concerned was contributing his earnings for the expenses of the family make his business as the business of the family.

Appeals under Order 36, rule 1, Original Side Rules and under clause 15 of the Letters Patent against the decree and judgment of Rajagopala Ayyangar, J., dated 1st May, 1959, and passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 32 of 1952.

K. Rajah Ayyar and *N. C. Raghavachari*, for Appellant.

R. Gopalaswami Ayyangar, D. Narasaraju, T. T. Srinivasan, A. N. Rangaswami, K. Sarvabhuman, B. S. Satyanarayana and *B. T. Seshadri*, for Respondents.

C. A. Mohammad Ibrahim and *K. T. M. Abdul Jabbar*, for Auditors.

The Judgment of the Court was delivered by

Ramachandra Ayyar, C.J.—This appeal arises out of the judgment of Rajagopala Ayyangar, J., in a suit instituted by Mrs. Padmini Chandrasekharan for a declaration that the business conducted in the name of Selvarajulu Chetty, her father, which later was transformed to Selvarajulu Chetty & Co., belonged exclusively to her as his sole heir and for certain allied and incidental reliefs. The business was that of Stevedore and ship chandler. Selvarajulu Chetty was about twenty-four years old when he started the business at Pondicherry in the year 1926. The family had its home at Kurichikuppam near Pondicherry. Shortly thereafter, an office for the business was opened at Madras with a view to take up contracts at the Madras Harbour for handling cargoes. Selvarajulu was on all accounts a man of considerable initiative and enterprise with a flair for making friendships with foreign businessmen. His business naturally gained momentum and had established itself in the course of the next few years at various centres, Nagapattinam, Cuddalore, Masulipatam, Kakinada, Visakhapatnam and Bhimlipatam. Success in business naturally led Selvarajulu to a prominent place in society as well as to lead him to take part in the politics of the French Settlements in India. The latter activity brought his life to an untimely end, as he was shot dead on 16th December, 1938, presumably by a political miscreant. It was only a month earlier that Selvarajulu's wife had died of a short illness. The plaintiff Padmini, their only child, was eleven years old when she was orphaned.

Selvarajulu at the time of his death was a member of a Hindu joint family consisting of himself, his younger brother Krishnaraj and paternal uncle Dakshinamurthi Chetty. The family had an aptitude for business. But several of its members who tried their hands at business did not, however, succeed. Most of them did not live long. We shall immediately refer to the fortunes of the family, in so far as it will be relevant for the disposal of the main question involved in the present appeal, namely, whether the extensive business conducted by Selvarajulu was his separate business or one conducted in his name by the joint family of which he was a member.

The plaintiff's original case was that there was a division in status between the several branches of the family in the year 1918 and consequently, the business which was started by her father eight years later must have been his individual

business. On the other hand the case for the contesting defendants was that the business of stevedoring was an ancestral business handed down to Selvarajulu from the time of his grandfather Chinnathambi Chetti. Both these extreme contentions were not even attempted to be proved. Rajagopala Ayyangar, J., found that although Chinnathambi Chetty and his sons were undivided, the family did not have much property nor were they engaged in any business during his lifetime. The learned Judge further found that there had been no division between the various members of the family in the year 1918 as alleged by the plaintiff. Therefore, at the time when Selvarajulu started his business and up to the moment of his death, he was and continued to be a member of an undivided Hindu family along with his brother and his paternal uncle. Neither side has challenged the correctness of these findings in this appeal.

It will be noticed that Selvarajulu was but a junior member of the family when he started his business. There can therefore be no presumption that the business conducted by him in his own name was not his separate business but a joint family one. The true position in law has been thus stated in paragraph 295-A of Mayne's *Hindu Law* (eleventh edition):

> " Whether in the case of a joint family possessed of some joint property, there is or is not a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business. Unless it can be shown that the business in the hands of a coparcener grew up from joint family property, or that the earnings were blended with joint family estate, they remain free and separate. The question whether the business was begun or carried on with the assistance of joint family property or as a family business is a question of fact upon which the initial burden of proof lies upon those who claim a share in the business."

We may as well state at this stage that it is not the case of the defendants that the business, though in origin the separate business of Selvarajulu, was later blended with the joint family estate. Though the original case for the defendants was that Selvarajulu's business was but a continuation of that carried on by his ancestors, there was, however, a change during trial. It was said that his business was started out of joint family funds and carried on by all of the members. To understand that plea, and indeed to better appreciate the circumstances which have led up to this litigation, it will be useful to set out the genealogy of the family first, restricting it to such of those persons whose name would have to be referred to hereafter.

Cinnathambi Chetty

- Rathnavelu (d. 1907)
  - Dorairaju (d. 1925)
- Nandagopal (d. 1922)
  - Selvaraj (d. 1938)
    - Padmini (plaintiff)
  - Jayalakshmi = Somasundaram (defendant 1)
    - Anusuya (Deft. 3).
  - Krishnaraj (d. 1943) = Anusuya (Deft. 3).
- Vijayarangam (d. 1919)
- Dakshinamurthi (d. 1951) = Kuppammal (Deft. 2) (d. 1958).

Ratnavelu, the paternal uncle of Selvarajulu, died in the year 1907. Two years later, his three brothers and his son Dorairaj started a business under the name of Rathnavelu Bros., as exporters, ship-chandlers, stevedores, etc. Later, Sam Joseph, a native of Ceylon, was taken in employment as the accountant of the firm. He has given evidence in the case as C.W. 1. Whether it was due to the First World War or to other causes, the business sustained heavy loss and it practically stopped by the year 1915. The services of Sam Joseph were terminated two years later and he went back to Colombo.

Vijayarangam, one of the brothers, appears to have then embarked on a separate business of his own. That venture was a failure. His private life too left every thing to be desired. The family thereafter entered into an arrangement on 4th February, 1918, evidenced by Exhibit P-1 between Vijayarangam on the one side, Nandagopal, Dakshinamurthi and Dorairaj on the other. The relevant portions of that agreement are these :

"(1) For five years from to-day, in addition to the properties so far in the possession of the four of us, the articles in the house in Puduvalperumal Koil street, which is in the possession of Vijayarangam Chettiar, the other properties shall continue to be in the possession of other persons.

(2) From this day onwards Vijayarangam Chettiar shall carry on business separately. Similarly, each of the rest of the individuals shall alone be entitled to or responsible for the profits or loss that each may get or sustain and each alone shall be liable for the debt that may be incurred by each of them. Each shall receive separately the income earned by each.

(3) If after the expiry of five years, if so desired, the properties shall be divided in accordance with law.

(4) During the said period of five years, the first three of us shall pay the other sharer of us i.e., Vijayarangam Chettiar, out of the one-fourth share of the paddy from the wet lands and also Rs. 50 per month and the two boats Nos. 45 and 51 and all other allied articles shall be entrusted to Vijayarangam Chettiar within one and a half months from this date.

(5) The aforesaid Vijayarangam Chettiar has agreed not to demand partition from the others in the common income for the said period of five years.

(6) If within the period of the said five years, if any creditor of any of us, in respect of the debt incurred individually, proceeds against the common properties, the said debtor in addition to indemnifying the other out of his share, shall also be liable to pay damages for loss of reputation in a sum of Rs. 15,000.

The learned Judge has found that this arrangement was not sham but one intended to be acted upon and in fact it was acted upon by the parties. That finding has not been challenged before us. Although the agreement purports to be between Vijayarangam on the one side, and Nandagopal, Dakshinamurthi and Dorairaj on the other, it is clear that, so far as the starting of business by any individual member was concerned, the terms of the agreement were to bind each one of them. The parties, no doubt, contemplated that they should continue to live together as members of a joint Hindu family. But at the same time, it will be clear from the terms of the agreement that the family as such did not want to take the risks of a business which any member thereof might commence. Past experience must certainly have dictated that the loss of an individual member in any business that he might start must be confined to him. That the apprehension of the family, as disclosed by the agreement, was more than well founded is shown by the fact that Nandagopal too who started his separate business thereafter did not fare well. Nandagopal started his separate business in the year 1921 by borrowing a sum of Rs. 5,000 from his brother-in-law—*vide* Exhibit P-68. In the following year he died an indebted businessman having sustained loss in his venture. That this business was the separate business of Nandagopal has been spoken to by Sam Joseph.

It is also in evidence that both Dorairaj as well as Dakshinamurthi had their separate businesses. The former was a Dubash of Ralli Brothers till the date of his death in the year 1925. Dakshinamurthi was struck with paralysis in the year 1914 and till the end of his life he remained a cripple. But that did not, however, prevent him from doing business. Indeed he appears to have had a number of businesses. He was attending to stevedoring work for the Clan Line Steamers at Pondicherry. He was also doing business in importing and selling diamonds and entering into contracts. In the year 1930 he registered himself with the Tribunal of Commerce at Pondicherry as acting in his own name for the business concern under the name of *Dakshinamurthi Chettiar, Contractor and Broker*. This business had been in existence since the year 1922.

It is in evidence that Selvarajulu was the most accomplished of all the members of the family in the matter of dealing with business people. He was proficient in French and English. Four years after his father's death, he started a business

in his own name, first at Pondicherry and later at other places. Sam Joseph, the tried and trusted accountant of the family, joined Selvarajulu's business in the year 1929 as the Manager of the Madras office. The business was very prosperous. As we shall show presently there is no evidence in the case to show that the joint family contributed any capital to Selvarajulu's business. But that some capital would be necessary for stevedores business cannot admit of any doubt. There is enough material in the evidence to show that there were accounts of the business at Pondicherry and Madras during the relevant period. These accounts would undoubtedly show whether any amounts, or as has been suggested any boats belonging to the family, were given over to him to help him in his business. The learned Judge has found that accounts were available for the relevant period, but they have been suppressed by the contesting defendants. One can reasonably presume, from such a conduct on their part that if produced those accounts would not support their case that family funds or property were utilised for the business of Selvarajulu. We shall, however, refer to this matter later in greater detail.

Unlike the other members of the family, Krishnaraj had no business of his own. It is the plaintiff's case that he was sickly but that has been denied by the defendants. Krishnaraj died in the year 1943.

Selvarajulu's sister Jayalakshmi was married to Somasundaram Chetty, first defendant to the suit. That was in the year 1918. Somasundaram started a business in the name of his wife (Jayalakshmi) at Madras. There is evidence that large sums of money were advanced by Selvarajulu himself out of his business funds to Jayalakshmi & Co., and the undischarged liability of the latter to the former was about Rupees one lakh and thirty-six thousand. The business, however, did not prosper and it was closed some time during the year 1944. But Somasundaram had other support. Kuppammal, the wife of Dakshinamurthi, was his cousin. She was greatly interested in his advancement. Naturally, he was able easily to ingratiate himself into the affections of Dakshinamurthi another link with the family was forged when he gave the elder of his two daughters, Anusuya (third defendant) in marriage to her maternal uncle Krishnaraj. The second daughter was married to Ramanathan, a near relative of Kuppammal. The position of Somasundaram in the family was thus secure.

The family had a common mess at Kurichikuppam, the ancestral house which was being improved from time to time. There was also a residence at Purasawalkam in Madras, where a bungalow had been taken on lease. Selvarajulu, during his lifetime, was undoubtedly in exclusive control of the various branches of his business. He had insured his life for the sum of one lakh of rupees in various insurance companies. The policies of insurance bore no endorsements of assignment and under the terms thereof, they would be payable, on the death of the assured, to his legal representatives.

Immediately after the death of Selvarajulu, Dakshinamurthi and Krishnaraj took over the business, claiming that they had *succeeded to the business carried on by the deceased according to Hindu Law by survivorship.* They also collected the amounts due from the banks as well as under the various insurance policies standing in the name of Selvarajulu.

There were amounts due to Selvarajulu from the Imperial Bank of India as well as from the Indo-China Bank at Pondicherry. There were other amounts due to the deceased from the post office, and public and private institutions. Dakshinamurthi was able to obtain a succession certificate on 21st December, 1938, within five days of the death of Selvaraju, from the French authorities. The existence of the minor daughter, Padmini, was suppressed in the application for the certificate. There was also an application in this Court for the issue of a succession certificate in respect of the insurance amounts due to the deceased as well as the amounts due from the Chartered Bank of India, etc. There again, the existence of the minor daughter of the deceased was not brought to the notice of the Court. This omission must without doubt have been deliberate. But at the same time, it must

be mentioned that Dakshinamurthi had considerable affection for the plaintiff Padmini, who was about eleven years when her parents died. Immediately on her father's death, Dakshinamurthi and his wife Kuppammal took charge of the plaintiff and brought her up. The learned Judge has observed :

> "The plaintiff was thus the only child in the family which any male member of the family had. It is therefore not surprising that the plaintiff was treated with great affection. It is stated in the evidence on both sides and there is no contradiction about it, that Dakshinamurthi was particularly fond of this child and probably treated her as if she were his own child as was just natural."

Plaintiff herself has acknowledged the great affection that Dakshinamurthi always had for her.

Five years after the plaintiff reached the age of majority, Dakshinamurthi converted the business continued in the name of Selvarajulu Chetty as a partnership concern. Out of one hundred shares therein, he took for himself fifty-one shares, Somasundaram (first defendant) was given twenty-one shares. Padmini (plaintiff) twenty shares, Ramanathan (fourth defendant) four shares and one Ramachandran, the remaining four shares. The partnership agreement is evidenced by Exhibit P-8, dated 27th October, 1948.

It was just a few months earlier that the plaintiff was married. By a further document, dated 26th March, 1951, (Exhibit D-27), it was agreed between the partners that the partnership was not to be dissolved by the death of any partner. This clause was presumably added to the pre-existing agreement as Dakshinamurthi was then very advanced in age and his end was anticipated. To both those documents the plaintiff had affixed her signature. Dakshinamurthi died on 26th June, 1951.

Even before the dead body of Dakshinamurthi was removed, disputes started between the plaintiff on the one hand and Somasundaram and Kuppammal on the other. The controversy then was, as to who should perform the funeral ceremonies of the deceased. Padmini asserted her right, but Somasundaram wanted to do them himself. As a result of a mediation by persons interested in the family a settlement was come to by which Somasundaram agreed to treat the plaintiff properly if the latter were to allow him—and which she did—to perform the funeral ceremonies. This settlement was not, however, an enduring one. An inventory was then taken of the movables of the family in the house at Kurichikuppam. There was also a settlement by which the plaintiff was allowed to carry on the business of Selvarajulu Chetty at Pondicherry, till then carried by Dakshinamurthi, as the sole proprietrix. Somasundaram, who appears to have had mental reservation even at the time when he solemnly agreed to treat the plaintiff properly, gave no little trouble to her while she took up the Pondicherry business, which was in the name of her father. But one Mr. Salzani, the agent in India of Messagerie Maritimes, took interest in her and he not merely secured for her the agency from that company but also made them lend to her a sum of Rupees thirty-two thousand to enable her to carry on the stevedoring business. Somasundaram first tried to discredit Mr. Salzani by complaining against him to his principals. Failing in that attempt, he tried to raise trouble by inducing the boat owners and others to refuse to co-operate with the plaintiff.

In December, 1951, an arrangement was come to between Padmini on the one hand and Somasundaram and Kuppammal on the other, so far as the properties situate at Pondicherry were concerned.

Soon after the death of Selvarajulu, Dakshinamurthi had purchased a property in the Beach Road at Pondicherry. A new residential mansion was built on that property and named *Selva Mansions*. In front of the property a statue of Selvarajulu had also been installed. During the lifetime of Dakshinamurthi, he had control over that property. But as we said, so long as he was alive Padmini had no real reason for complaint. Under the arrangement referred to just now, Padmini was given Selva Mansions.

Sam Joseph, who had throughout rendered loyal service in the business started by Selvarajulu became dissatisfied with the way in which Padmini was treated by

Somasundaram. During the months of July and August, 1951, he conveyed information to Padmini about two matters : (i) that the business done in the name of her father was during his lifetime his own and that he would be entitled to it as his heir and (ii) that her father had insured his life for a considerable sum of money and that she would be entitled to recover these moneys which had been collected by Dakshinamurthi and Krishnaraj. Sam Joseph further appears to have given her some documents, with a view to assist her in making out a claim in respect of the business and the insurance moneys as against Somasundaram. Padmini by then had the advice of her husband and her father-in-law. After getting information from Sam Joseph they presumably advised the plaintiff not to accept the position as a partner of Selvarajulu Chetty and Company, but to insist upon her rights as the sole proprietrix of the concern. Selvarajulu Chetty and Company, which was till then carried on as partnership under the deed of 27th October, 1948, had been registered under section 26-A of the Income-tax Act. When Dakshinamurthy died, an application had to be made for registering it afresh for the period between 26th June, 1951, the date of his death, and 31st March, 1952, the end of the year of account. Somasundaram, therefore, requested the plaintiff to sign the necessary forms, admitting the position that she was a partner, as otherwise the incidence of taxation would be heavy. Sam Joseph, who was serving the company, considered the request to be proper and advised the plaintiff to sign the forms. But Padmini said that she would do so if she were allowed access to the account books of her father's business. Somasundaram did not agree, with the result that Padmini ultimately refused to sign the necessary documents for registering the firm with the Income-tax authorities. This not merely accentuated the feelings between the parties, but it also estranged Sam Joseph from Padmini, towards whom he had till then feelings of affection and also a feeling that she had been unjustly treated by her paternal relations. The latter, thereafter, took the side of his *de facto* employer Somasundaram. It was after this that in November, 1952, the plaintiff brought the suit, out of which this appeal arises, for relief in regard to what she alleged was, her father's business, and for recovery of the insurance moneys and of certain jewels. During the pendency of the suit, Kuppammal died in January, 1958, leaving a will substantially bequeathing all her properties to Somasundaram.

The learned Judge, on a detailed consideration of the evidence, came to the conclusion that the account books of the business of Selvarajulu Chetty, during the period when the plaintiff's fa her was conducting the same, were with the defendants and that they were suppressing the same. He also came to the conclusion that, notwithstanding that suppression, there was other evidence in the case, which justified the inference that the business conducted by Selvarajulu Chetty was a joint family business, which, on his death, survived to his coparceners, namely, Krishnaraj and Dakshinamurthy, and that the only right which the plaintiff could claim, in regard to the business of Selvarajulu Chetty at Madras, would be as a partner of the firm which came into existence as a result of the partnership deed, dated 27th October, 1948. An account of the business was directed to be taken on that basis from the date of suit with an injunction restraining the defendants 1, 3 and 4 from carrying on the business.

Padmini has filed this appeal (Original Side Appeal No. 49 of 1960), claiming that she would be entitled to an account on the footing that she was solely entitled to the business commenced by her father. The learned Judge has also passed a decree against defendants 1, 3 and 4 to pay a sum of Rupees, 1,04,423 with subsequent interest, out of the estate of Krishnaraj and Dakshinamurthi in their hands, towards insurance moneys collected by them. There was also a direction to the first defendant to return to the plaintiff the jewels mentioned in the decree. Defendants 1, 3 and 4 have filed Original Side Appeal No. 60 of 1959 against this part of the decree. The appeal was heard simultaneously with this appeal but a separate judgment is being delivered today on that appeal. During the pendency of the appeals Somasundaram died and his legal representatives have been brought on record.

The learned Judge had to consider the question whether Padmini would be estopped from claiming the business of her father as hers, by reason of her conduct in accepting the partnership agreement, dated 27th October, 1948. He observed :

"If the plaintiff had established (*a*) that the business of Selvarajulu Chetti was her father's and that she was induced to enter into partnership agreement of 27th October, 1948, on the misrepresentation by Dakshinamurthi that the business belonged to the joint family in which she had no interest, there could be no question of estoppel by reason merely of her joining the partnership in October, 1948. If, on the other hand, as I have held, the business was a joint family business, the representations by Dakshinamurthi—express or implied—were true and therefore, apart from any question of estoppel, she would be entitled only to the rights conferred on her by the partnership agreement."

In the course of her evidence the plaintiff has stated that at the time when the partnership agreement of 1948 was given to her for her signature by Dakshinamurthi, she particularly asked the latter about the nature of the business, when he replied :

"You happened to be a girl. Your father's business has come down to me. If you happened to be a boy it would have come to you. Out of free will I will give you some share."

Having regard to the relationship that existed between Padmini and Daskhinamurthi, she could not have then suspected that the latter was speaking anything but the truth. We, therefore, agree with the learned Judge that Padmini must have signed the partnership deed on the assurance given by Dakshinamurthi in regard to the character of the business, namely, that it was a joint family business which she could not and did not inherit. If it were to be proved by the other evidence in the case that the business was in fact the separate business of Selvarajulu, then this representation of Dakshinamurthi must be regarded as false and any assent of Padmini to the partnership secured, on the basis of such a representation, must be held to be not binding on her.

The principal point for consideration in this appeal, therefore, is whether the business commenced by Selvarajulu Chetty in the year 1926 in his name, was his separate business or the joint family business ?

It is now well-settled that there is no presumption that a business carried on by a member of a Hindu Coparcenary is joint family business. As has been observed by Venkatarama Ayyar, J., in *Chattanatha Karayalar* v. *Ramachandra Ayyar and another*[1], under the Hindu Law, there is no presumption that a business standing in the name of any member is a joint family one, even when that member is the manager of the family ; it would make no difference in this respect even if the manager happens to be the father of the coparceners. In *Annamalai Chetti* v. *Subramanian Chetti*[2], Lord Buckmaster, delivering the judgment of the Privy Council, observed that a member of a joint undivided family could make separate acquisition of property for his own benefit, and unless it was shown that his business grew from joint property, or that the earnings were blended with joint family estate, they would be free and separate, and that the onus of proving that any particular item of property was joint would primarily rest upon the person setting up a case of its joint family character. The question was again considered by the Privy Council in *Bhuru Mal* v. *Jaganath*[3], where Sir George Rankin said :

"...... special considerations apply to the question whether or not a business belongs to the family or to the individual member who carries it on. If it be a joint family business, then all the members of the family are liable for its debts upon the terms and to the extent laid down by the Hindu Law. Whether or not it can be said that if a joint family is possessed of some joint property, there is a presumption that any property in the hands of an individual member is not his separate individual property but joint property, no such presumption can be applied to a business"

Whether a business standing in the name of a member of a family belongs to the family itself, in the sense that it was begun and carried on with the assistance of joint family property, or whether it is the separate one of a member will be a question of fact, the burden of proof, being on the person who claims a share in the business. It will be competent for such a person to show the joint family character of the business by proving that the family contributed to the commence-

1. (1955) 2 S.C.R. 477.
2. (1929) 56 M.L.J. 435 (P.C.).
3. (1943) I M.L.J. 70: A.I.R. 1942 P.C. 13, 16.

ment or carrying on of the business, or that the business itself was treated by the member, in whose name it was standing, as part of the joint family property.

Mr. D. Narasaraju, the learned Advocate-General of Andhra Pradesh, appearing for the defendants invited our attention to the early case in *Rampershad Tewary* v. *S. Doss and others*[1], as supporting a contrary view as to the burden of proof in such cases. In that case the evidence fell far short of proof that the ancestral property contributed in any material degree to the acquisition of funds utilised in the trade, but there was evidence that the five brothers in the family were actively engaged in the management of a branch of the business. In a partition arrangement subsequently entered into between them, it was accepted that the branches were integrally connected with the main business. The Privy Council came to the conclusion that the gains of the business being made by the joint exertions, would be really joint property of the family so long as it was undivided and would be partible as such. This decision if at all falls in the second category of cases we have mentioned above, namely, where the separate business of a member is treated by that member as joint family business. The case can also be said to be one of a joint business. The case in *Vasudeva Rao* v. *Sakharam Rao*[2], was also one where the members of a family jointly traded in the name of one among them. That was also the case in the next cases relied on behalf of the defendants, *Manilal* v. *Bai Sushila*[3] where it was held that where in a joint family the sons actively helped their father in carrying on the business started by the latter, without any remuneration for the work done by them, the business should be regarded as the joint family business.

Mr. Narasaraju argued that the business of stevedores would require capital, whether it be for payment of wages of the labourers or for deposit with the steamer companies, and that the family must have contributed out of its funds for those purposes. It was further said that as the family had been doing a like business, it was more than likely that the boats owned by the joint family were used for the purpose of Selvarajulu's business. In support of the argument reference was made to the recital in Exhibit P-1, which referred to the handing over of two boats belonging to the family to Vijayarangam. There can be little doubt that the business of stevedores would require finance, even at its commencement. But it cannot be assumed that such finance must have been necessarily advanced by the family. Selvarajulu might have raised monies on loan as his father did on a similar occasion. We shall presently consider the question whether the family did advance any moneys for the starting of the business, or help him by providing him with boats.

There is no evidence in the present case that the family owned boats and such boats were given to Selvarajulu for the purpose of his business. The learned Judge has found that on the eve of the starting of the stevedore business by Selvarajulu, the family was joint, as indeed it continued to be till the last of its male members died, that it was then only moderately prosperous and that though the three members of the family, Nandagopal, Dakshinamurthi and Dorairaj, had each a business in their respective names, the income therefrom must have been pooled together for the benefit of the family. It must, however, be remembered that Nandagopal's business venture was a failure. The family had to celebrate the marriages of its younger members and they must have absorbed considerable sums of money; very little surplus must have been available with the family. Indeed, there is no evidence in the case to show that there was sufficient surplus available to enable substantial advances being made to Selvarajulu's business. Dakshinamurthi and Dorairaj were having their separate businesses. Even if one were to assume that those businesses were prosperous ones, no attempt has been made to show that after meeting the expenses of the family, there was sufficient amount left for the family to advance moneys to Selvarajulu. It is no doubt true, that the chief business that the several members of the family took up, was in connection with the supply of boats

1. 10 M.I.A. 490.
2. 54 M.L.J. 239 : A.I.R. 1928 Mad. 412.
3. A.I.R. 1956 Bom. 402.

or labour to steamers which called at Pondicherry Port. But the business in stevedoring can be done with the help of hired boats ; it may also be that the person carrying on the business owns some boats. There is, as we said, evidence in this case that in the year 1918 two boats were given to Vijayarangam. But what happened to them, whether Dakshinamurthi utilised them for his own business after Vijayarangam's death or how many boats were owned by the family or by one or other of its members, whether by any boats were at all given to Selvarajulu as nucleus to help him in the business, has not been brought out in the evidence. The only persons who could have given any valuable evidence on that matter are Somasundara, who has been examined as D.W. 2, and Sam Joseph, C.W. 1. About the former, the learned Judge observed :

> "It is a matter for regret that even from the stage of his examination-in-chief his answers were so irresponsible that he wrote himself down as unworthly of credit. His testimony is so full of prevarication and obviously untrue answers that I can place no reliance on any portion of his evidence except on some admission wrung out of him."

Sam Joseph, though he at one time tried to help Padmini, undoubtedly revealed an inclination to support completely his employer the first defendant. The probative value of his evidence cannot, therefore, be put high.

Even apart from that consideration, obscurity exists in the evidence as regards any contribution by the family towards the capital of Selvarajulu's business. Further ther is practically no evidence on the question as to whether any help that was given to Selvarajulu was intended for his separate use. At the family arrangement of 1918, we have shown that Vijayarangam was given two boats, so that he can carry on his separate business. Therefore, the mere fact that some monetary or other help was given to a member of the family for starting his business, cannot necessarily mean that it was a contribution made to the detriment of the family, so as to make the business subsequently started by the individual member, a joint family business. It is not an inflexible rule of Hindu Law that a profit made by a member of a joint family from the enjoyment of joint property, but without detriment to the joint family, will not be his separate property. For example, when money is given to a member of a family by the manager from the family funds to be spent by him for his own personal use, any profit made by him by the use of that money can be regarded as his own, because there could be no detriment to the family estate ; see *Lachmeswar Singh* v. *Manowar Hossein*[1], and *Bengal Insurance and Real Property Co., Ltd.* v. *Velayammal*[2]. Again, it may be possible that a family advances money to a member thereof for starting a business by way of loan. In *Rammayya* v. *Kolanda*[3], it was held that where the joint family, acting through the manager, makes an allotment of property to its member in order to enable him to maintain himself, that member would not be accountable for the income of the property so allotted and that any acquisitions made by him from out of the savings of income of such property would be his separate property. In *Manickam Chetty* v. *Kamalam*[4], a concern was carried on with coparcenary funds and the share of the individual coparcenar, in whose name the business was run, was debited with the sums given by the family. It was held that that fact might show an intention on the part of the family that the business should belong to the individual member. There is practically very little acceptable evidence in the present case whether any contribution—in the shape of money or boats—was made by the family to the business started by Selvarajulu in the year 1926. It can be said that there is nothing to show whether such moneys as might have been advanced by the family, were given only as loans to be repaid later by Selvarajulu. Learned Counsel for the defendants relied strongly on the circumstance of the business having expanded in a short time as indicative of the contribution by the family for the opening of the several branches thereof. There can, however, be no assumption in regard to that matter. As pointed out by Sir George Rankin in *Bhuru Mal* v. *Jagannath*[5]:

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1. (1881) I.L.R. 19 Cal. 253.
2. I.L.R. (1937) Mad. 990.
3. (1939) 2 M.L.J. 639 : I.L.R. (1940) Mad. 322.
4. (1937) 1 M.L.J. 95.
5. (1943) 1 M.L.J. 70 : A.I.R. 1942 P.C. 13, 17.

"It is not irrelevant to reflect how many times businesses of substantial size have arisen not merely from small beginnings but by the activity of an energetic man wholly without capital, content to begin selling goods for others and in due course obtaining credit for small transactions on his own account."

It is admited in the present case that Selvarajulu was a man of considerable energy and initiative. As the learned Judge has found, his success in the business was outstanding. It was presumably as a tribute to his memory that Dakshinamurthi, soon after Selvarajulu's death, purchased a property in the Beach Road, Pondicherry, built up a premises and named it after Selvarajulu, installing his statue in front thereof. No such recognition was given to any other member of the family and one can infer from this conduct of Dakshinamurthi, that Selvarajulu's efforts were solely responsible for the prosperity of the business.

Mr. Narasaraju has argued that whatever might be the presumption in law in regard to a business in the name of a member of a joint Hindu family, no such presumption could be resorted to in the present case, in view of the fact that Padmini, after she became a major and had also the advice of her husband and father-in-law, voluntarily subscribed to the partnership deed, Exhibit P-8. The learned Judge, as we stated earlier, was prepared to draw no inference by reason of this conduct on the part of Padmini, if her case that she trusted Dakshinamurthi's words and had no knowledge that the business standing in the name of her father was his separate business, were to be accepted. We are in respectful agreement with that view. It would follow that the burden which lay on the defendant of proving that Selvarajulu's business belonged to the joint family, cannot, in the circumstances of the case, be held to have been shifted to the plaintiff by reason of her agreeing to become one of the partners of the firm in the year 1948.

Considerable evidence has been adduced by both the parties to the litigation on the question whether the business was the separate business of its founder or not. Unless such evidence is regarded as equally balanced, there will be no occasion for deciding the case on the basis of the onus of proof. We shall presently refer to the various circumstances of the case, which have a bearing on the question to be decided.

Taking up the question of the contribution of capital to business when it was started, we have already referred to the fact that the oral evidence given by Somasundara as D.W. 1 is far from acceptable. The evidenceg iven by the other witnesses on this question cannot be regarded, in any sense, as satisfactory. Probably, the best evidence in regard to that matter will be furnished by the account books maintained for the business. The learned Judge has found that such account books exist and they have been suppressed by the contesting defendants. This finding of the learned Judge has been challenged before us by learned Counsel appearing for the defendants. It is argued that there were no accounts maintained for the business prior to the year 1936 and even if there were any, the plaintiff must be held to have suppressed the same. Support for the first part of the contention is sought from the evidence of Sam Joseph who stated that there were no regular accounts till the year 1936. That this statement cannot be true, is clear from the other evidence in the case. The contending parties to the dispute had legal advice, the moment dispute arose between them. Subsequent thereto, correspondence followed between the Advocates for the plaintiff and Somasundara. Under Exhibit P-20 Sam Joseph then on the side of the defendants, invites Padmini to come over to Madras and inspect the account books. On 15th September, 1952, Padmini, by her letter Exhibit P-21, complains that she was not shown the account books maintained by the founder of the firm. That letter brought forth a reply (Exhibit P-22) in which Sam Joseph, acting on behalf of the firm, assured her that :

"nobody would stand in the way of your inspecting all the books of the firm since *its inception*."

In Exhibit P-25 the Advocate for Somasundara offered inspection of the books of account in the business premises at Madras. But when actually the plaintiff's representative went for the inspection, the accounts prior to 1948 were not given. Exhibit P-27 states that :

"the manager refused to give inspection stating that the said accounts had nothing to do with my client and that my client is not entitled to have inspection of the same."

Again in Exhibit P-3, a letter written by the Advocate acting on behalf of Somasundara, it is clearly admitted that:

"records extending over a period of twenty-five years will conclusively establish that the business was commenced and continued to be joint family business."

Exhibit P-37 also proceeds on the footing that there were in existence account books. It was only on 2nd December, 1952, after the suit had been filed, it was stated that old account books bundled up in gunnies were in the godown and that a list had been taken of them. But yet, those account books were never placed before the Commissioner for his signature. The correspondence between the Advoctes clearly shows that the account books must have existed. Somasundara, when asked what possible objection he could have to give inspection to the plaintiff of the earlier books of account merely stated:

"As she desired to inspect accounts relating to the period prior to the agreement, I was not willing to produce these account books for inspection."

He admitted later that account books were maintained at Pondicherry during Selvarajulu's time. He also admitted that at the time when Padmini wanted inspection of the account books by her Auditor and Lawyer, all such account books were in the Madras Office. That those account books related to the period since the commencement of business will be clear from the following answers given by Somasundara:

Q.—You were withholding inspection of certain account books. What were they?

A.—Accounts for the previous period.

Q.—Therefore those books were there?

A.—Yes.

Q.—The account books sought inspection of were those of the period ever since Selvarajulu started business?

A.—Yes.

In addition, there is also evidence to show that the fourth defendent had made a statement to the Commissioner that account books from the year 1929 were in the office of the firm. Strangely but understandably, when the Commissioner, who was appointed by the Court, went to take an inventory of the account books, he could find only a few books at the office of the firm at the North Beach Road and when he went to the residence of Somasundara, he found the house locked. One can reasonably infer from this that the prior account books must have been removed by Somasundara from Madras on learning that a Commissioner had been appointed by Court to take an inventory of them.

The other contention of the learned Counsel for the defendants, namely, that the earlier account books must have been with Padmini, who has suppressed the same, is without any substance whatsoever. That case was not even suggested to her when she was giving evidence. Therefore, agreeing with the learned Judge, we are of opinion that there were account books of the firm ever since its inception and they have been suppressed by the defendants in the case.

This conclusion would entitle the plaintiff to call to her aid the presumption under the law that the account books, if produced, would be against the party suppressing them. In *Ramachandrudu* v. *Janakiramanna*[1], the Privy Council, considering the effect of the presumption enacted by *Illustration* (*g*) to section 114 of the Indian Evidence Act, states:

"Their Lordships recognise the value of the presumption, and most certainly throw no doubt on the propriety of its application where it fits the facts; but it cannot displace a contrary inference supported by adequate evidence......"

In *Sandanam* v. *Somasundaram*[2], Varadachari, J., took it as a well-established proposition that an inference from the non-production of account books could be drawn

1. (1921) 13 L.W. 293 (P.C.). 2. (1937) 1 M.L.J. 364.

only if the other circumstances in the case warrant such an inference. We have, therefore, to consider in the present case, whether the materials on record are sufficient to prove that the business started by Selvarajulu was his own.

We have earlier pointed out that there had been no disruption in the joint family by reason of Exhibit P-1. But that circumstance cannot necessarily lead to an inference that the business conducted by a member of the family is joint family business. Indeed, in the present case, the learned Judge has found that both Dorairaju's as well as Dakshinamurthi's businesses were their respective separate businesses. Selvarajulu's business was, no doubt, similar to the one which his father conducted, but there was a break of four years since the cessation of his father's business and the starting of his own. Learned Counsel for the defendants has argued that the family must have had boats, which are essential for the business of stevedore and chandler. But, there is no evidence in the case that there were boats in the family, which were given over to Selvarajulu. The learned Judge has found that Selvarajulu must have been consulting Dakshinamurthi and have looked up to him for guidance in the conduct of his business. Mere consultation with the head of the family or guidance by the latter, cannot make the business of a member, joint family business. Dakshinamurthi was a cripple. He was not conversant with French language, which was essential for the business which Selvarajulu started. Further, he was himself fully occupied in his own ventures. Krishnaraj was, however, free. He was not having any business at all. But there is very little evidence in writing, apart from the statement made by Selvarajulu before the Income-tax authorities to which we shall make reference later, to show that Krishnaraj was participating in his brother's business. In that very statement, Exhibit D-9 to the Income-tax Authorities, Selvarajulu significantly stated.

"The whole business is conducted by me only".

It has been argued on behalf of the defendants that the very magnitude of the business of Selvarajulu would show that there should have been other participants thereto. Selvarajulu, it was said, was interesting himself in the politics of the French Settlements : he would, therefore, have had very little time to devote himself to his business, and Dakshinamurthi and Krishnaraj must, therefore, be held to have managed that business. We are unable to accept this contention. The fact that the business of Selvarajulu had several branches, cannot mean that more than one person would be necessary for the conduct of the business. The number of branches were as many as eight and they exceeded the number of male members in the family. If it were to be held that one person cannot manage them all together, three of them too could not have managed the same. It is common knowledge that not unoften such business are conducted through trusted employees and there is nothing in the evidence before us to show that there were not such employees at the various places where Selvarajulu's business had branches.

The proceedings before the Income-tax Authorities for the year 1936-37 make reference to Krishnaraj staying at Masula for about three months in the year. There is also evidence to show that he was drawing certain moneys. But, whether his stay was a regular one as a proprietor of the business or whether he went there as an employee of Selvarajulu, can be ascertained only from the account books of the business, which unfortunately have been suppressed. Such account books, if produced, would have shown whether the drawings made by Krishnaraj were done with the authority of Selvarajulu or whether they were taken by him in his own right. Or it may be that the drawings made by him were debited to his account in adjustment of salary or as payment to him as an employee ; it may be that he was treated as a debtor of the firm. No inference could, therefore be drawn from the mere fact that Krishnaraj was allowed to draw moneys. There is no evidence to show how much money he drew and for what purposes.

There are, however, two important circumstances in the case, which, if unexplained or regarded as sufficient in the context of the other circumstances might go a long way to support the defendants' contention. The first is, that during the absence of Selvarajulu in the year 1931, when he left India for stay in

Paris, a loan of Rupees eighteen thousand was raised for the purpose of his business under Exhibit D-7 by Dakshinamurthi and Krishnaraj. The document bears the date 28th December, 1931. The property mortgaged was joint family property. But the executants did not refer to the business as one in which they had any interest. On the other hand, Dakshinamurthi, describing himself, stated that he was acting in his own name and in the capacity of proxy for Selvarajulu. The loan contracted under that document was discharged by Selvarajulu himself. For the defendants, Exhibit D-7 is relied on as disclosing conduct from which an inference of the joint family character of the business would be irresistible. We are, however, unable to accept that extreme contention. It is not uncommon for members of the family to accommodate another member of the family by helping him to raise loans for his own business. Such help cannot necessarily mean that the business of such a member is joint family business. There is evidence in this case of joint borrowings by Dakshinamurthi and Selvarajulu. Exhibit D-8 evidences a borrowings of a sum of Rupees ten thousand by Dakshinamurthi and Selvarajulu on 3rd July, 1935. The principal and interest due on this promissory note were paid out of the business funds of Selvarajulu by a draft drawn on the Imperial Bank of India, where he had an account : *vide* Exhibit D-36 (*b*).

In the assessment of the Income-tax Officer relative to the year 1936-37, there is a reference to a borrowing by Selvarajulu and Dakshinamurthi of Rupees ten thousand in the year 1936 from Messrs. Soora Bros. How far this recital can be taken as evidence of the borrowing is a doubtful point. But even if there be such a borrowing, it cannot necessarily lead to the inference that the borrowing was for a joint family business. No evidence has been let in, in the present case to show whether Selvarajulu had accommodated Dakshinamurthi for his admitted separate business by that transaction or *vice versa*. Exhibit D-35 evidences a suit instituted by the Official Assignee of Madras against Dakshinamurthi and Selvarajulu in respect of a deposit alleged to have been made by an insolvent, C. K. N. & Sons with the defendants therein. Selvarajulu is described in the plaint as carrying on business at Madras. There is, however, nothing in that plaint to suggest that the business was a joint one. It was not a relevant occasion for the defendants therein to assert or deny any individual right that they may have in respect of their respective businesses. The only fact that emerges from Exhibits D-35 and D-35(*a*) is that the insolvent deposited moneys and found accommodation for the defendants from time to time. The learned Judge has regarded this document and the statement of account which accompanied the plaint, as showing that the transactions of Selvarajulu and Dakshinamurthi were intertwined. We are, with respect, unable to share that view. A deposit by a third party with Dakshinamurthi and Selvarajulu cannot necessarily mean that the business of one was interwined with the other particularly when that money has not been shown to have gone into Selvarajulu business. At the risk of repetition, we may point out that it is not the case of the defendants that Dakshinamurthi's business was a joint family business. It might be that Dakshinamurthi took that money for his business. If the inference drawn by the learned Judge from Exhibits D-35, D-35 (*a*) and D-35 (*b*) were to be accepted Dakshinamurthi's business also must be a joint family business. Yet, that is nobody's case. It can be taken as probable that both Dakshinamurthi and Selvarajulu contributed moneys for the upkeep of the joint family, which consisted of not merely the members of the family but of Somasundara's as well. But such contributions for the maintenance of the family or acts of kindness of either Dakshinamurthi or Selvarajulu towards the other members of the family cannot mean that each one of them had lost control over his separate business and threw it into the common stock.

The most important evidence in the case is Selvarajulu's statement to the Income-tax Authorities. That is evidenced by Exhibit D-9. He has admitted in that statement that Krishnaraj was undivided from him, that he stays in a part of the Masulipatam business premises and that the business itself was a joint family business. But curiously enough, there is no mention in the statement of Dakshina-

murthi's interest in the business of Selvarajulu. The only joint family referred to in it is the family consisting of Selvarajulu and his younger brother Krishnaraj, who were the sons of Nandagopal. Exhibit D-9 itself contains certain obvious misstatements. For one thing, it is stated there that the business which Selvarajulu was carrying on was a continuation of his father's business, which is not true. It then proceeds to say that Krishnaraj was paid monthly allowances and that he would be entitled, on partition, to a share of the business. On the basis of that statement, the Income-tax Officer assessed Selvarajulu as a Hindu undivided family. After Selvarajulu's death, the assessment was made as if the assessee continued to be a Hindu undivided family consisting of Krishnaraj and Dakshinamurthi : *vide* Exhibit D-14. But strangely enough neither Krishnaraju's nor Dakshinamurthi's earnings were brought into the assessment. There is clear evidence to show that the statements of Selvarajulu before the Income-tax Authorities were motivated. The learned Judge has found that Selvarajulu, when he made those statements, stood to gain by the business being treated as belonging to a joint Hindu family. This conclusion is amply supported by the evidence. Exhibits P-94 and P-95 are letters written by Sam Joseph and Ramanathan to Selvarajulu on 10th June, 1937, and 16th October, 1938, respectively. They reveal a desperate anxiety on their part to reduce the income-tax payable by the firm. Exhibit P-94 shows that Krishnaraj was acting under a power-of-attorney from Selvarajulu. Significantly enough, Sam Joseph in that letter says :

> " From the arguments brought forward *on your admission of joint family* by the Income-tax Officer, the stay of Krishnaraj at Masulla may affect our case even though we made it plain that his stay at Masula was only temporary for attending to the steamers during their stay in the port for the purpose of supervision."

This letter is capable of the construction that the admission as to the joint family character of the business was made by Selvarajulu with ulterior motives. In the other letter, Ramanathan assures Selvarajulu that his Advocate was a personal friend of the Commissioner of Income-tax and he could get substantial reduction of the tax through his influence. Under the Finance Act applicable to the relevant period, an individual would be liable for super-tax if his income was above Rupees twenty-five thousand, whereas in the case of a joint Hindu undivided family, the limit will be Rupees fifty thousand. It has been conceded by learned Counsel for the respondents that the attempt of Selvarajulu at that time was to prove that he was a non-resident and therefore liable only to a reduced tax on that account. The avoidance of super-tax and income-tax must therefore have been the motive with which the statement about joint family was made to the Income-tax authorities. The very assessment order, Exhibit D-14, shows that Dakshinamurthi was doing business with Selvarajulu's firm. It is stated that Dakshinamurthi made a profit by supplying dunnage to Selvarajulu's business. That is inconsistent with Dakshinamurthi having an interest in the business. Sam Joseph has stated in his evidence that Selvarajulu's business was assessed sometimes as an individual concern and sometimes as a Hindu undivided family. Although the assessment orders by the Income-tax Authorities must have been in existence from the very commencement of the business at Madras, no attempt has been made by the defendants to produce those assessment orders. One cannot, therefore, place much reliance upon the admission of Selvarajulu contained in Exhibit D-9, which, as we pointed out earlier, is not merely prefaced by false statements of fact but is also inconsistent with the family being the owner of Selvarajulu's business, as Dakshinamurthi has not been shown as entitled to an interest in the business or of having participated in the same. Referring to this aspect of Selvarajulu's statement, the learned Judge observed that he must have been advised that it was advantageous not to mention Dakshinamurthi. We have, however, no evidence of any such advice being given to Selvarajulu. The circumstance that Dakshinamurthi had supplied dunnage at a profit to Selvarajulu's business might either indicate that the price was inflated, in which event that circumstance will be consistent with Selvarajulu's business being a joint family business, or it might indicate that Dakshinamurthi's separate business had earned a profit by its transaction with Selvarajulu's business. Having

regard to the fact that Dakshinamurthi was having a separate business, the profits earned by him in the supply of dunnage must *prima facie* be regarded as a result of a transaction *inter se* between Dakshinamurthi and Selvarajulu.

It must be remembered that Dakshinamurthi had his own banking account. This has been admitted by Somasundara in his evidence, although he would say that that account, which was with the Indo-China Bank, was a family account. If that were so, one would certainly have expected Somasundara to produce Dakshinamurthi's bank account or any other account that he might have kept for his own business. There is a complete black-out of information in regard to Dakshinamurthi's separate business. During the course of the cross-examination of Sam Joseph, an attempt was made to show that a sum of Rupees 126-12-0, which was paid by Messrs. Gordon and Woodroffe and Company, to Dakshinamurthi, was actually put into the account of Selvaraj with the Chartered Bank, at Madras. Nothing has been established in the evidence to show that that sum was payable to Dakshinamurthi. Even assuming that it was so, a solitary instance of that kind cannot prove that Selvarajulu's business profited by Dakshinamurthy's contribution. It is not unusual that the facilities which an individual has with a bank are utilised by others for realising the cheques issued to them. None of the circumstances referred to above, except the statements and proceedings relating to the assessment of income-tax and the joint borrowings for the business, can be regarded as by itself sufficient to prove that the business carried on by Selvarajulu was not his own. However the proceedings relating to the assessment to income-tax of Selvarajulu as a Hindu undivided family, together with his statement before the Income-tax Officer, though of a comparatively high probative value, cannot be given much weight, in the circumstances of the case, for there was a motive for the assessee then to state that his business was that of the family. Selvarajulu was then young and he could not have expected that his end was near. Having regard to the cordial relationship that existed between himself and the other members of the family, he might have thought that he would not be prejudicing his interests by making the statement of the kind contained in Exhibit D-9. So far as the joint borrowings are concerned, they are not inconsistent with one or other of the members of the family coming to the aid of Selvarajulu for raising moneys. We must not forget that the evidence in the case establishes that in every case, the discharge of such borrowed moneys was made out of the moneys earned in Selvarajulu's business.

Sam Joseph has stated that Krishnaraj was attending to the business in some of the branches and that there were plenty of documents to support that case. Except the papers relating to the income-tax proceedings, no others have been produced to show that Krishnaraj participated in Selvarajulu's business. The case for the plaintiff is that Krishnaraj was a sickly person. Whether that has been made out or not, there is very little documentary evidence to show that he played any significant part in the management of any of the branches of the business. The assessment proceedings only disclose that Krishnaraj had been to Masulipatam but in what capacity and for what purpose he did so, is not clear.

We have also to note certain other significant circumstances in coming to the conclusion whether Selvarajulu's business was his separate one or not. All the contracts entered into for the purpose of the business were admittedly in his name. D.W. 2, Somasundara has admitted this. The fact that it was Selvarajulu that incurred personal obligations in respect of such contracts and that on occasions he had even to borrow moneys from Multanis, is seen from the evidence. A short time before the death of Selvarajulu, one of the creditors of his business had filed a suit in the Sub-Court of Cocanada for recovery of a sum of Rupees eight thousand. The claim was in respect of amounts advanced to Selvarajulu's business at Masulipatam and Cocanada. The only defendant impleaded to the action was Selvarajulu. If Krishnaraj was really attending to the business at Masulipatam and he had an interest in such business, there was no reason why the creditor should not have impleaded Krishnaraj as well. But that he did not do. It will

be evident from this piece of conduct on the part of a third party, that the only person carrying on the business at Masulipatam and Cocanada was Selvarajulu himself. During the pendency of the suit, Selvarajulu died. The creditor thereupon took steps for impleading Padmini as his legal representative. But both Dakshinamurthi and Krishnaraj had decided to continue the business themselves and therefore they applied to come on record in the suit and ultimately settled that claim. Krishnaraj, as the paternal uncle and guardian of Padmini, filed a counter-statement to the creditor's application to implead Padmini, stating that the latter was not the legal representative of the deceased defendant. In that statement (Exhibit P-46-B) Krishnaraj states, referring to himself and Dakshinamurthi : *They are continuing all the business of the defendant under the name and style of the deceased* defendant. No document has been produced by the defendants to show that during the lifetime of Selvarajulu either Krishnaraj or Dakshinamurthi undertook the responsibility of the business or to share in its profits. This is in significant contrast to what happened after Selvarajulu's death. Then, both Dakshinamurthi and Krishnaraj entered into an agreement (Exhibit P-105) for doing business. We have already referred to the fact that a large sum of money amounting to nearly Rupees one lakh and thirty-six thousand had been advanced from out of the funds of Selvarajulu's business to Somasundara, for his business run under the name of Jayalakshmi and Company ; Somasundara has admitted that it was Selvarajulu who advanced him that money. Significantly enough, no mention is made of Dakshinamurthi in regard to that matter.

It has also been admitted by Somasundara, that the second item which was mortgaged under Exhibit D-7 stood in the name of Selvarajulu. That Selvarajulu had purchased properties in his own name, has been stated by two of the plaintiff's witnesses. But, unfortunately, owing to the attitude adopted by the defendants in the case, of suppressing all material evidence that would help the plaintiff's case, it had not been possible for the latter to produce at the trial documents relating to purchases made by Selvarajulu during his lifetime. The learned Judge referred to the fact that several of the documents had been entrusted to mediators at the time of 1951 settlement. Mr. Balasubramaniam, an Advocate practising at Pondicherry, had custody of them. Unfortunately, he died and his clerk, one Ambalavanan, got into possession of those documents. There is evidence to show that Somasundara got a number of documents from him and that he had left with Ambalavanan, by inadvertence, Exhibits P-1 and P-2 which Padmini was able, later to secure. Padmini was, however, able to get copies of certain documents relating to purchase of properties by Selvarajulu. She filed Civil Miscellaneous Petition No. 7841 of 1963 for reception of the certified copies of sale deeds, as additional documentary evidence in the case. There was practically no objection to the receipt of that evidence and we, by an order on that application, admitted those documents in evidence. They have since been marked as Exhibits P-110 to P-112. These documents evidence purchase of five items and they unmistakably show that Selvarajulu had the intention of retaining exclusive control over his earnings. If the business conducted by him had belonged to the joint family, one would have expected him to make these purchases in the name of the manager of the family, namely, Dakshinamurthi. It is not suggested on behalf of the defendants that it is the practice of the family to make purchases in the names of its junior members. For example, no document has been filed to show any purchase in the name of Krishnaraj. There is also no evidence on the side of the defendants to show that any purchase, out of the earnings of Selvarajulu's business, was ever made in the name of Dakshinamurthi. Thus, it will be seen that out of the earnings from his business, Selvarajulu had purchased properties, had insured his life for a substantial amount and had advanced a large sum of money to Somasundara and there was also a substantial balance remaining in his banking account, which was later on drawn out by Dakshinamurthi and Krishnaraj.

Sam Joseph, who must certainly have been in the know of things, apprised Padmini immediately after the death of Dakshinamurthi that the business run

in the name of Selvarajulu Chetty and Co., was really her father's separate business. Though he would now support the case of his employer, his earlier version supports only the case of the business being the separate business of Selvarajulu.

It is no doubt true that both Dakshinamurthi and Krishnaraj set up the case that the business belonged to the joint family immediately after the death of Selvarajulu. Their conduct in that regard, however has not been as straight as one would have expected. With undue haste they obtained a succession certificate from the Pondicherry authorities. In this Court also they applied for a similar certificate without disclosing that the deceased had a daughter surviving, although the relevant provisions of the Indian Succession Act did require them to state that fact. They informed the constituents of the firm that they have succeeded to the business of Selvarajulu. But it is somewhat significant that when Krishnaraj begins to write, a few days after the death of his brother, to two of his friends, he refers to the business as *Selvarajulu's business* ; *vide* Exhibits P-44 and P-45. Was this due to the fact that those friends were aware of the true character of the business and it would be only inviting trouble if he were to assert title to the business in himself?

Learned Counsel for the defendants places strong reliance on the admission made by Padmini in her evidence that Dakshinamurthi was very fond of her and brought her up as his own daughter. He, therefore, argues that Dakshinamurthi, who had no child of his own and looked upon Padmini as his own daughter, would be the last person who would deprive her of her right to the legitimate succession to the business and that his conduct in taking over the business as forming part of the joint family property would be indicative of the business itself being a joint family one. It is difficult to accept this contention. Probably, at the time when Dakshinamurthi took over the business, he thought that personal factor being an important one in the business, there was no harm in claiming it as his own and that he could later recompense Padmini sufficiently for what he took over, or he might have thought that treating the business as a joint family business would avoid the inconvenience of continuing the business in the name of a minor girl, and of furnishing security to the appropriate authorities for the due administration of her property. But immediately after Padmini got married, Dakshinamurthi admitted her as a partner in the business. Having regard to the nature of the business one can say that the 20 per cent. share in the business given to Padmini is a fair recompense for the ownership of the goodwill. The remaining 80 per cent. was distributed between the actual workers in the business, and we consider that it is by no means an unfair measure of the worth of the services of those people.

To sum up, the business of stevedoring started by Selvarajulu in the year 1926, when he was just 24 years old, must have required some capital. But the family, having regard to its past experience and to the further fact that Selvarajulu was very young and inexperienced at that time, would not have undertaken the risks of business by starting one in his name. That conduct would indeed be consistent with its declared policy in Exhibit P-1. Who made the initial contribution for the business of Selvarajulu has not been made out in the evidence. The account books would have furnished valuable evidence on that point, but such account books have been suppressed. Therefore the plaintiff, there being no other evidence in regard to the contribution of capital by the family, would be entitled to ask the Court to draw the inference that if the account books were produced, they would militate against the theory of contribution by the family. As we said, even if some moneys had been contributed by the family, they might have regarded it as a present or temporary accommodation given to Selvarajulu, so that he could use the same for the purpose of his own business. There has been no participation in the business either by Dakshinamurthi or Krishnaraj during the lifetime of Selvarajulu, although the business expanded during a comparatively short period of time. There is no doubt some evidence of joint borrowings by the members of the family for the purpose of Selvarajulu's business. But such borrowings are few and are not inconsistent with the business being Selvarajulu's own. The statement made by Selvarajulu

before the Income-tax authorities that the business belonged to the joint family consisting of himself and Krishnaraj supports neither one case not the other. The statement itself has been demonstrated to be inaccurate in its premises and as one motivated with the object of securing a benefit in the payment of income-tax. It was only after the lifetime of Selvarajulu that Dakshinamurthi and his nephew asserted title to the business as forming part of the joint family property. It must however, be said that at that time Dakshinamurthi had no motive to cheat Padmini, whom he was bringing up as his own child. But as against all these, there are also these facts ; the family itself could not have had much available cash to advance to the business, which was done in the name of a junior member. Selvarajulu was entirely managing his business in his time and had his own bank accounts, while Dakshinamurthi had his separate business and a separate banking account. There is also evidence that Dakshinamurthi was having transactions in the sale of dunnage with Selvarajulu. While there is evidence that Selvarajulu had purchased from out of his earnings in his business, properties in his own name, there is no evidence that any properties were purchased in the name of Dakshinamurthi, the manager of the family, out of such earnings. It is true that the family was large and more than one marriage had been celebrated in the family at great expense. Dakshinamurthi as well as Selvarajulu must have contributed not a little for those expenses of the family. But the mere fact that a member of a family contributes his earnings for the expenses of the family, cannot make his business as the business of the family. Taking all these circumstances together, we are of opinion that the business of Selvarajulu must be regarded as his own. The utmost that one can say in this case, is that the evidence is equally balanced. The rule as to the burden of proof will, then, have to be resorted to for the purpose of deciding the issue. Agreeing with the learned Judge, we have already held that any admission inferable in Padmini subscribing to the partnership deed, must have been made at a time when she was not in full possession of the facts relating to the business and it could not be given that amount of weight which it would otherwise have. Under these circumstances, the burden of proving that the business did not belong to Selvarajulu, must lie on the defendants. This they have failed to discharge. We are, therefore, unable, with respect, to agree with the conclusion reached by the learned Judge in regard to the declaration sought, *viz.*, that she is the sole and absolute owner of the business of N. Selvarajulu Chetty and that run under the name and style of Messrs. N. Selvarajulu Chetty and Co., being entitled to the goodwill thereof. She will be entitled to that declaration and an appropriate injunction against the defendants.

The next question relates to the further relief to which Padmini would be entitled. The learned Judge, in view of his finding that the only right to which Padmini would be entitled, was that of a partner, granted her relief by calling upon the defendants to account as and from 20th November, 1952. But, in view of our finding that the partnership documents will not be binding upon her and that she would be entitled exclusively to the goodwill of the business carried on under the name of Selvarajulu Chetty and Co., it must follow that both Dakshinamurthi's estate as well as the other defendants would be liable to render her an account. But, as we pointed out earlier, the success of the business of stevedoring will have to depend largely on the personal attention and devotion which the persons in charge thereof give it. There can be little doubt that after the death of Selvarajulu, Dakshinamurthi, Krishnaraj and Somasundara contributed very much to the preservation as well as the prosperity of the business. They would be entitled to take out of the profits of the business, a portion by way of remuneration. So long as Dakshinamurthi was alive, it is admitted that he was treating Padmini as his own child. She was married at considerable expense and she also obtained, under the arrangement of the year 1951, her share of the family propertes, some of which must presumably have been earned out of the income from the business. Under those circumstances, we consider that it will be inequitable to direct any accounting for the period ending with Dakshinamurthi's death. Subsequently thereto, the business was carried on by Somasundara and other persons. They would be liable to

render Padmini an account. We consider that, in all the circumstancs of the case, the 20 per cent. share of profits fixed by Dakshinamurthi under the partnership deed to Padmini is a fair measure of the amount due to the owner of the goodwill. There will, be a decree for an account of the income from the business from the date of death of Dakshinamurthi, and 20 per cent. of the profits will have to be paid by the persons in management of the business to Padmini. They will have to account for the assets of the business as well as for profits at the rate mentioned above. Appeal allowed with costs on the scale allowed by the learned Judge.

Appeal allowed.

Original Side Appeal No. 60 *of* 1959.

The Judgment of this Court was delivered by

Ramakrishnan, J.—The first defendant Somasundaram Chettiar, the third defendant Anasuya and the fourth defendant Ramanathan have appealed against the decision of Rajagopala Ayyangar, J. (as he then was) in Civil Suit No. 329 of 1952. Kuppammal (second defendant) died during the pendency of the suit and the first defendant to whom she had executed a will in respect of her properties became her legal representative. Pending the appeal Somasundaram Chettiar (first defendant) also died and the fourth defendant, the Advocate-executor under the will of the first defendant, and the fifth defendant were added as his legal representatives. Learned Counsel for the third defendant (second appellant) Anasuya represented that he did not press the appeal so far as his client was concerned, but the appeal was pressed on behalf of the first appellant (now by his legal representatives) and on behalf of the third appellant (fourth defendant).

In this appeal, the subject-matter comprises of the reliefs given to the plaintiff by the decree of the learned Judge. These reliefs are : (i) the right to have an account taken of the assets of Messrs. N. Selvarajulu Chetty and Company at Madras, as it stood on 20th November, 1952, defendants 1, 3 and 4 being restrained by an injunction from carrying on the business subsequently ; (ii) it was found by the learned Judge that the late Selvarajulu had taken four insurance policies in his name and that on his death the amounts of these insurance policies which came to Rs. 1,32,416, were drawn by Dakshinamurthi and Krishnarajulu. The learned Judge's finding was that Rs. 27,993 was paid towards *premia* by Selvarajulu from the joint family funds, and that the plaintiff was entitled to the insurance money less the *premia* paid, which came to Rs. 1,04,423. The decree directed defendants 1, 3 and 4 to pay this amount to the plaintiff, from the assets of Krishnarajulu and Dakshinamurthi in their hands. Since, out of the insurance money, Rupees fifty thousand had been spent on the erection of Selva Mansions which passed to the possession of the plaintiff, a charge on the assets of the firm of Selvarajulu Chetty and Co. was given only for the balance of Rupees fifty-four thousand four hundred and twenty-three. The assets in the hands of Dakshinamurthi devolved on his wife Kuppammal and on her death they devolved on defendants 1, 3 and 4. Therefore the decree also made defendants 1, 3 and 4 liable to pay the aforesaid sum, out of the assets of Kuppammal or any benefit derived from Kuppammal, in their hands, (iii) the plaintiff claimed in the suit the return of the jewels specified in paragraph 16 (*d*) of the plaint or their value as estimated in the plaint. It was found that out of these jewels, three items had been given to one Palaniswami Mudaliar as a loan and he deposited them into Court. The plaintiff was directed to take a return of them from the Court. The decree directed the first defendant to hand over the remaining jewels listed out in the schedule to the plaint or failing that, to pay the plaintiff the value thereof estimated at Rupees one lakh and three thousand, with interest thereon at six per cent. per annum from the date of decree till the date of payment.

The present appeal of the aggrieved defendants deals with the above reliefs granted to the plaintiff. So far as the appeal in regard to the first relief of account taking is concerned, our decision in the connected appeal Original Side Appeal No. 49 of 1960, pronounced to-day, will apply. It is also convenient to deal in

this judgment with certain objections raised by the plaintiff-respondent herein, and appellant in Original Side Appeal No. 49 of 1960. These objections relate to the deduction of *premia* from the amount of the policies by the learned Judge, and disallowance of interest on the amount decreed between the date of plaint and date of decree. We will take up next for consideration the claim in regard to the insurance policy amounts. The particulars of the policies are succinctly : (i) a policy for Rupees ten thousand with the Sun Life Insurance Company taken on 21st December, 1919 ; (ii) another policy for Rupees thirty thousand with the same company taken on 20th August, 1928. These two were endowment policies and were not made the subject of any assignment but were made payable to the insurer, or on his death to his executors, administrators and assigns. The other two were also endowment policies for amounts of Rupees thirty thousand and Rupees fifty thousand taken on 8th April, 1936 and 25th March, 1937 respectively with the North British Mercantile Insurance Company, Limited, Calcutta, the amount being payable to the assured or his representatives or assigns. On these policies yearly *premia* were paid, and the amount assured became due when Selvarajulu died of gun-shot wounds in 1938. It is also in evidence that Dakshinamurthi and Krishnarajulu, immediately after the death of Selvarajulu, got a declaration Exhibit P-12 from the Assistant Judge of the Pondicherry Court entitling them to realize these amounts, under the procedure followed in the French territories at Pondicherry under the French Law. Armed with this declaration, Dakshinamurthi and Krishnarajulu approached the insurance companies to pay the amount to them. The Companies were not willing to act upon the declaration given by the French Authorities at Pondicherry and insisted upon a succession certificate, under the law in force in Indian territory. Dakshinamurthi and Krishnarajulu filed a petition for succession certificate in the Madras High Court—Original Petition No. 202 of 1939—on 27th July, 1939. They swore in that petition that they were the only heirs of Selvarajulu and next-of-kin according to the Hindu Law, and that they were the sole surviving coparceners entitled to the assets of Selvarajulu, which included these insurance amounts. They also alleged that the premia were paid from the funds of the business of Selvarajulu which was a joint family business. The form of the application prescribed under the Indian Succession Act, requires that the details of the members of the family or other relatives of the deceased should be stated. But Dakshinamurthi and Krishnarajulu deliberately omitted all references to the existence of Padmini the daughter of Selvarajulu, the plaintiff in the suit. Taking advantage of certain rules on the Original Side of the High Court, they obtained orders from the Court for dispensing with the publication of the application in the daily papers. They also got an order in their favour for dispensing with the furnishing of security. Thereafter on 10th August, 1939, a date within ten days after the re-presentation of the petition, after rectifying certain formal defects, they got an order in their favour. With that order, they got the sums assured paid to them. These facts are not now in dispute.

The learned Judge found that the business carried on by Selvarajulu was a joint family business, and that the premia had been *paid out of the income of that joint family business*. He relied upon a decision of this Court in *Venkata Subba Rao* v. *Lakshminarasamma*[1], where the learned Chief Justice P. V. Rajamannar, expressed the view that in the case of policies of insurance,

> "having regard to the modern social conditions and the growth of individual consciousness in marked contrast to the more corporate outlook of an earlier day, the general presumption must be that, when one of the members of a joint family insured his life, the amount of the policy belongs ......to the assured as his separate property and does not become a joint family asset and that the premia (even if paid from the joint family funds) must be treated as amounts drawn by the individual members and they must be debited with those amounts."

Treating this view as a proposition of law, the learned Judge held that the plaintiff was entitled to the assured amounts less the premia paid. Since Dakshinamurthi and Krishnarajulu had utilized the insurance amounts by spending Rupees fifty thousand for the two constructions called Selva Mansions and Selva

1. (1954) 1 M.L.J. 94 : I.L.R. (1954) Mad. 26.

Park in Pondicherry, only the balance of Rupess fifty-four thousand, four hundred and twenty-three went into the business of Selvarajulu Chetty and Co., which was continued by Dakshinamurthi and Krishnarajulu after Selvarajulu Chetty's death leading to a charge for the latter amounts on the assets of that firm.

In view of our finding in the connected appeal Original Side Appeal No. 49 of 1960, that the business of Selvarajulu Chetty and Co., was the separate business of Selvarajulu Chetty, it would follow, that the policy amounts belong to the plaintiff in their entirety, as the sole heir of Selvarajulu Chetty. But arguments were also advanced before us as to whether the finding of the learned Judge, in regard to the policy amounts could be supported, on the basis that the premia were paid out of the income of Selvarajulu Chetty and Co., which according to the learned Judge was a joint family business. We propose to deal with this argument also briefly, in the following paragraphs.

The learned Counsel appearing for the appellants, Sri R. Gopalaswami Ayyangar, urged that the above, mentioned decision in *Venkata Subba Rao* v. *Lakshminarasamma*[1], was considered by the Supreme Court in *Parbati Kuer* v. *Sarangdhar*,[2] and in the light of the principles laid down by the Supreme Court the conclusion of the learned Judge could not be supported. However, the decision of the Supreme Court seems to have depended to a great extent on the facts of the particular case, and we find no express dissent from the view of the Bench of this Court in *Venkata Subba Rao* v. *Lakshminarasamma*[1]. In the Supreme Court case, one of three brothers who belonged to a joint Hindu family had taken three insurance policies on their lives and on his death, his two step-brothers claimed the insurance monies as joint family property. There was a concession in the High Court on behalf of the appellant, that the *premia* were paid out of the joint family funds. Besides this concession, their Lordships of the Supreme Court also referred to the evidence in that case, which showed that in the account books of a printing press, which was a joint family concern, there was an insurance khata in which the payment of *premia* for all the policies were entered, and there was no separate khata for each brother showing the debit of the insurance *premia* in the separate khata. There was also proof that some of the policies matured in the lifetime of the insured. The proceeds of one policy were deposited in different khatas of the joint family, and they were used also for the purposes of the joint family. Addressing themselves to the question whether as a matter of law, insurance was a special venture and was meant only for the benefit of the family of the assured and whether the other coparceners had no interest in the policies, their Lordships observed that the question was not whether the particular member took out the policies for the benefit of his own family, but whether he did so without detriment to the joint family funds and that if it was the latter, then anything obtained with the joint family funds would belong to the joint family. Then they referred to the judgment of the Bench of this Court in *Venkata Subba Rao* v. *Lakshminarasamma*[1], and observed that it was not necessary for the Supreme Court to decide whether the broad proposition stated by the Bench should be accepted because in the particular case before them there was evidence to show that none of the brothers intended to treat as a separate asset the assured amounts payable on maturity and that therefore the case fell within the exception contemplated by the Judges of this Court in their decision. It may be recalled that this exception, deals with evidence showing a clear indication that the member did not intend to treat the insurance amount as his separate asset.

In the present case, the most significant factor is that the first defendant, who had in his possession the accounts of the business of Selvarajulu Chetty and Co. did not care to produce them into Court in spite of repeated opportunities given to him for the purpose. These accounts would have clearly shown the existence of two vital requirements stressed by the Supreme Court in their judgment, before the joint family could claim the insured amount as part of their assets, *viz.*, (i) that the *premia* were paid under circumstances which amounted to a detriment to the joint

1. (1954) 1 M.L.J. 94 : I.L.R. (1954) Mad. 26. 2. A.I.R. 1960 S.C. 403.

family funds : (ii) the evidence of conduct or other dealing which would show that the insurer did not intend to treat the insurance amount as his separate asset.

The learned Judge observed in the course of his judgment that though there was not much evidence as to how the premia were paid on the first of the policies, dated 21st December, 1919, in regard to the later policies, there was clear evidence that they were paid out of the monies in the banking accounts opened in respect of the business and hence it would follow that the premia were paid out of the joint family funds. At the time when the first policy was drawn up in 1919, the business of Selvarajulu Chetty and Co., had not commenced. Shortly before Selvarajulu and his brothers had entered into the agreement Exhibit P-1 in 1918, under which one of the brothers left the joint family, the other brothers who remained joint in food and residence and kept the immovable properties undivided, agreed that in respect of the business which might be con ucted by each of them, the others would not be liable either for profits or losses. The amount of the a first policy was not large and the premia amount also was not considerable (about Rupees six hundred per annum). It is only for the subsequent policies after the business of Selvarajulu Chetty and Co. was commenced in 1925 the insurance amounts were large : Rupees one lakh and ten thousand and the annual premia were also correspondingly large (about Rupees four thousand five hundred). It would be a legitimate inference that Selvarajulu, taking into account the flourishing nature of the business and the profits it yielded, decided to go in for these heavy insurance policies. Since he married in 1924 and the plaintiff had been born in 1925, it will be quite reasonable to hold that he took these additional policies in 1928, 1936 and 1937 as any other prudent person would do, to benefit his wife and daughter.

It is pointed out by the learned Counsel for the respondent, Sri K. Rajah Iyer, that even if one were to assume that the business of Selvarajulu Chetty and Co. was a joint family business, there is not enough material to conclude that the premia were paid with detriment to the joint family funds. In the absence of, the relevant accounts of the business, the task of deciding this question has become exceedingly difficult. It has been found that the first defendant was in possession of the accounts of the Madras branch of the business. The payments of the monies are entered in the banking accounts kept in Madras. The Madras accounts of the business would have shown clearly whether the payment of the premia caused detriment to the family funds, and whether Selvarajulu intended to treat the policy amounts as assets of the joint family. D.W. 5, Ramanathan Chettiar, was the cashier of the Madras branch of the business. He deposed in general terms that the premia were paid by cheques out of the family business, and that Krishnarajulu had likewise paid premia by cheques from the business funds. The pass books of the banks at Madras were made available to the witness and they contained entries for withdrawal of the amounts paid for the premia. They also contained entries for deposits made from time to time. In cross-examination the witness stated that there were two bank accounts in Madras, one with the State Bank of India and the other with the Chartered Bank. He swore that the State Bank account though it stood in the name of Selvarajulu was not a personal account, but was a business account. Similarly the Chartered Bank account in the name of Selvarajulu Chetty was a business account. This witness asserted that Krishnarajulu and Daskhinamurthi were also at times operating on this account which stood in the name of Selvarajulu, but he could not support the above assertion by producing the counterfoils of the cheques, which must have been certainly retained in the Madras office of the business. It is unlikely that the bank would have permitted any person other than Selvarajulu to withdraw amounts standing in his name. The same witness stated that the payment towards insurance premia were debited to the insurance account kept by the business. It therefore becomes important to verify this latter statement which, in present context will be even more important than the withdrawal of the monies from the banking account of Selvarajulu for payment of insurance premia. If such debits had been made, in the insurance account, it will have significance for the purpose of showing whether the payments were treated as involving detriment to the business funds or were adjusted to personal drawings. Without

this essential item of evidence, it cannot be concluded that the insurance premia were paid out of the joint family funds, in the sense of amounting to detriment to those funds, and to justify the policy amounts being construed as joint family assets. The duty lay upon the first defendant to produce the accounts of the business at the Madras branch but he has failed to do so. We are, therefore, constrained to draw the conclusion that the policy amounts belong to the plaintiff as the heir of Selvarajulu. Further, in the absence of evidence to show that the premia were paid with detriment to the joint family funds, there will be also no justification for deducting the premia paid from the policy amounts. The decree in favour of the plaintiff will, therefore, be for the full policy amounts which total up to Rs. 1,32,416.

The next item for consideration is the liability for jewels. The rel ef in regard to jewels is stated in paragraph 16 (*d*) of the plaint thus :—

"1. One diamond *addigai* of 22 cts. worth Rupees thirty thousand.

2. One gold *oddyanam* with pendants with precious stones worth about Rupees four thousand five hundred.

3. Two diamond rings now worth about Rupees three thousand.

4. Gold sandalwood cup. }
5. Gold rosewater sprinkler. } Rupees nine thousand five hundred.

6. Gold plate of the value of 160 sovereigns now worth Rupees eight thousand.

7. One pair of ear-rings with diamonds 15 cts. now worth about Rupees thirty thousand.

8. One ring set with diamonds of 8 cts. worth about Rupees fifteen thousand.

9. One gold watch chain with pendant set with stones worth about Rupees four thousand five hundred.

10. Jewels belonging to the plaintiff which were in the custody of the late Dakshinamurthy Chettiar—

(i) One diamond *thali* billai set with diamonds now worth about Rupees twenty thousand.

(ii) One diamond set vankey set with 8 cts. diamonds worth Rupees ten thousand.

(iii) One forehead wear-set with diamonds worth Rupees three thousand."

Out of these jewels the decree gave relief for all the items. However Items 10 (i) and 10 (ii) and Item 2 were found to have been given to one Palaniswami Mudaliar, P.W. 2, who deposited them into Court. These items were directed to be handed over to the plaintiff. In regard to the rest of the jewels, the learned Judge gave a decree against the contesting defendants either for returning the jewels or in default to pay their value as estimated in the decree, namely, Rupees one lakh and three thousand with interest from the date of the decree till the date of payment.

In regard to the jewels mentioned in paragraph 16 (*d*) of the plaint, the plaintiff asserted that Items 1, 2 and 3 were her mother's sridhana jewels, that Items 4, 5 and 6 were made out of sovereigns presented to the plaintiff at her ear-boring ceremony and belonged to her, that Item 10 also belonged to her and that Items 7, 8 and 9 belonged to her father having been worn by him. The defendants did not deny the existence of these jewels or their value. Their defence was that the jewels were the properties of the joint family, and that, therefore, the plaintiff could not claim them. They also set up a plea of limitation, assuming that the jewels belonged to the family. More specifically Kuppammal pleaded in her written statement filed on 2nd January, 1954 (that date she was alive), that the family had large jewels and heir-looms and that several sets of jewellery were made for each member of the family. The jewels which the plaintiff's mother was wearing and the jewels which the plaintiff herself had been wearing, had all been taken away by the plaintiff and were with her. But the jewels mentioned in paragraph 16 (*d*) of the plaint were not the sridhana properties of the plaintiff's mother, but were joint family jewels. The ear-rings and the watch chain shown as Selvarajulu Chetty's jewels were in existence even from the time of Ratnavelu Chetty and therefore they were joint family jewels. The plaintiff's contention was that till the death of Dakshinamurthi in 1951 she was sharing the same house with him, that the twelve items of jewels mentioned in the plaint were always kept in his possession for the sake of safe custody, that she was allowed to use them on festive, marriage or other occasions, that they were handed over back to Dakshinamurthi for safe custody, and that they were kept in an iron-safe in Madras, and also at Pondicherry. Some of the jewels,

which were brought to Madras were not taken back to Pondicherry because of difficulty over customs. During the pendency of the suit an inventory was taken by a Commissioner, who visited the residence of the parties. The details of this inventory show that several ladies of the family kept only articles of no great value in their own almirahs. Such articles were plainly those which they would require for their ordinary use. But the really valuable jewels were not kept in these almirahs. This would support the case of the plaintiff that her own valuable jewels were entrusted to her father's paternal uncle Dakshinamurthi for safe custody. When her mother died, followed shortly afterwards by her father, the plaintiff was only about ten years old. She immediately passed under the protection of Dakshinamaurthi and his wife. Until Dakshinamurthi died, the plaintiff was treated with great affection as a member of his household. It is, therefore quite likely that the costly items of jewels mentioned in the plaint were in the safe-keeping of Dakshinamurthi. We are also not able to accept the contention of the first defendant that the plaintiff's mother had no sridhana jewels of her own and that such jewels as she wore on festive occasions were jewels given to her from the stock of family jewels. There are photographs taken of the plaintiff and other ladies of the household and they show that the ladies used to wear fairly elaborate items of jewellery as are usually worn by Hindu ladies belonging to an affluent family. The family of Selvaraj in the lifetime of Selvaraju became a very rich one, and it is in consonance with the inference deducible from these photographs that the ladies were adorned with valuable jewels like diamond ear-rings, *oddiyanam* and *addigai* which are among the items mentioned in the plaint schedule. As pointed out by the learned Judge, though Krishnarajulu died, his widow Anasuya is alive, and she would have been a proper witness to speak to the jewels belonging to her sister-in-law, namely, plaintiff's mother. She could also give evidence as to the alleged practice of giving the plaintiff's mother the family jewels to wear only on festive occasions. The learned Judge also has pointed out, in our opinion rightly, that the valuable jewels would have been made between the period 1926-38 when the family fortunes were at their peak, and that the accounts maintained at that period would show the expenditure on the making of the jewels. The omission of the first defendant to produce these accounts will lead to an adverse inference regarding the claim that the jewels mentioned in the plaint were jewels made only to be kept as joint family properties. Jayalakshmi, wife of the first defendant, is the sister of Selvarajulu. As sister-in-law she woud be certainly aware of the jewels belonging to the plaintiff's mother, and there is no explanation why this lady has not been examined by the defendants. As regards the jewels worn by Selvarajulu, items 7, 8 and 9 in the plaint schedule which account for nearly Rs. 50,000 of the suit claim, there is no proof of the first defendant's contention that these jewels belonged to Ratnavelu and therefore were family jewels. The photograph of Selvarajulu show that he was interested in adorning his person with diamond ear-rings and so on. This is consistent with the habits of the people in this part of the country where prosperous menfolk also wear jewellery like diamond ear-rings, finger-rings and even neck chains of gold. P.W. 2, Palaniswami Mudaliar, to whom three of the jewels had been entrusted by Dakshinamurthi seems to be a straightforward and reliable witness. He has referred to the photograph M.O. 4 of Selvaraj. He also has referred to the practice of Selvaraj, Krishnarajulu and Dakshinamurthi in wearing diamond ear-rings made up of high class diamonds of a large size. We may also remark in this connection that there is evidence to show that Dakshinamurthi was dealing in diamonds and it is not unlikely that advantage was taken of this circumstance for all the members of the family to adorn themselves with valuable diamond jewellery as personal ornaments. The learned Judge in the course of the judgment has taken into consideration the evidence in regard to each item of jewellery and given his reasons for coming to the conclusion in favour of the plaintiff. We are in agreement with his conclusion in this respect.

There is one other circumstance, which will be necessary to be mentioned regarding the valuation. Though in paragraph 16 (*d*) of the plaint the value of the jewels worn by Selvarajulu, items 7, 8 and 9 has been given as Rupees thirty thousand, Rupees fifteen thousand and Rupees four thousand five hundred respectively,

in paragraph 17 of the plaint it is alleged that Selvarajulu Chetty was called a *Diamond King*, and that he had worn on his person a pair of very costly diamond ear-rings, gold chain, watch and chain and diamond rings, worth about Rupees twenty thousand. It appears to us that this valuation of Rupees twenty thousand was intended to cover the value of all the personal jewels of Selvarajulu Chetti, and not the value of the last mentioned item, namely, the diamond rings alone. We entertain a genuine doubt, therefore, in regard to the correct valuation of items 7, 8 and 9 the personal jewels of Selvarajulu, whether the claim made in paragraph 16 (*d*) about their value, whose total comes to Rupees forty-nine thousand five hundred or the claim made in paragraph 17 of the plaint, namely, Rupees twenty thousand should be accepted. We have also to point out that the plaintiff did not examine any witness to prove the value of the jewels. The learned Judge has given his decision about the value solely on the ground that the first defendant had not contested the value of the jewels set forth in the plaint. In view of the above discrepancy, we are of the opinion that it will be proper to restrict the value of items 7, 8 and 9 in the schedule to the amount of Rupees twenty thousand stated in paragraph 17 of the plaint. Therefore, the decree passed for the value of the jewels in the alternative will be reduced by the difference of amount of Rupees twenty-nine thousand five hundred.

There was finally a claim on behalf of the plaintiff (the respondent) that Dakshinamurthi and Krishnarajulu had drawn the insurance monies on 25th September, 1939, but the lower Court had not given any interest on these amounts from that date, and that this should be provided for. This is one of the grounds urged in the plaintiff's appeal, Original Side Appeal No. 49 of 1960, but it will be considered here as it arises out of the insurance amounts. After her father's death in 1938 the plaintiff was living in Dakshinamurthi's family till 1952 and all her requirements of education, food and other expenses were met in a liberal scale during this period by Dakshinamurthy. In the above circumstances, we are of the opinion that the grant of interest on this amount from the date of plaint would be adequate to meet the needs of the case. Subject to the above the appeal will be dismissed in other respects with costs.

P.R.N. — *O.S. Appeal No. 49 of 1960 allowed; O.S. Appeal No. 6 of 1960 dismissed, subject to modification of decree in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

Shaik Kasim .. *Petitioner**

v.

The Superintendent of Post Offices, Chingleput Division, Chingleput and another ... *Respondents.*

Administrative Tribunal—Government servant—Acquittal of offences under Penal Code by a criminal Court—Finding how far binding on Administrative Tribunal enquiring on identical charges upon identical facts.

An Administrative authority, in initiating disciplinary proceedings, is not bound to wait for the verdict of a criminal Court. But, where the criminal Court has tried the concerned person and acquitted him, it would be improper and such a proceeding is liable to be quashed as not in consonance with the principles of natural justice, if the Administrative authority later initiates disciplinary proceedings on the identical facts and identical charges and records a contrary conclusion.

There could be no rigid or inflexible rule that the finding of a criminal Court is conclusive, in every sense, upon the Administrative authority. If the finding is purely a technical acquittal, the Administrative authority may conceivably punish on the facts. It can certainly punish where the acquittal is solely based on lack of sanction or some technical defect in procedure. It could punish on the same facts, for some lesser charge, which may not amount to a criminal offence, but may well amount to grave dereliction of duty, entailing disciplinary action.

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* W.P. No. 1256 of 1962. 25th November, 1964.

Where the acquittal is substantially on merits, on identical facts and charges, it will not be proper for disciplinary tribunal to record a finding of guilt, and to punish thereon.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records relating to the Order of the Superintendent of Post Offices, Chingleput Division in proceedings No. F.1/2/59 dated 23rd January, 1960, confirmed by the Order of the Director of Postal Services, Madras, in his Memo. No. STB/I/LA. 604, dated 14th April, 1960, and quash the said order and made therein.

K. K. Venugopal and *V. Manivannan*, for Petitioner.

S. Mohan, for the Additional Government Pleader on behalf of Respondents.

The Court made the following

ORDER:—An interesting and important question arises in this writ proceeding, upon which I find that, though there is no paucity of authorities, the central principle has not been analysed or discussed at any length in any of the decisions cited before me. The problem involved is whether, when a Criminal Court acquits a Government Servant upon grave charges involving offences under the Penal Code, and the acquittal is not upon some collateral ground, such as the absence of due sanction or a technical plea of defence, but substantially on the merits, a Domestic Tribunal, such as a higher authority exercising disciplinary jurisdiction, would be justified in disregarding the acquittal altogether, or in recording a conclusion in consistent with the acquittal, and finding the Government Servant guilty on the identical charges, upon identical facts. The matter arises against the following background of established facts.

The petitioner became a servant of the Government of India in the Posts and Telegraphs Department in 1936. From the year 1956, he was serving as Sub-Postmaster at various places. On 9th March, 1959, while he was serving at Arni, he received a notice with regard to ten charges framed against him. It is important, for our purpose, to scrutinise the substance of those charges. Charges 1 and 4 to 10 related to irregularities mostly of a subsidiary character, charge 4, which appears to be the most serious, related to alleged incorrect entries in an attendance register from 8th January, 1959 to 14th January, 1959 regarding the permanent E.D.D.A. Charges 2 and 3 were very serious, taken together, and it is not disputed that upon the facts, which formed the basis of those charges, the Departmental Authorities gave a complaint to the Police to the effect that the writ petitioner was guilty of offences under sections 409, 467 and 471, Indian Penal Code. The petitioner alleges that he took up the stand that he should be first prosecuted in the Criminal Court, and that the Departmental Authorities should abide by the decision of the Criminal Court. But, actually, the disciplinary enquiry was not held in abeyance. However, the petitioner was ultimately prosecuted in the Sessions Court, Chingleput under those sections, and acquitted in respect of those charges by the judgment of the Court dated 11th October, 1960.

As far as the Departmental Proceedings are concerned, they went according to routine, and the explanation of the delinquent officer was obtained and an enquiry held. On 23rd January, 1960, by order of the Superintendent of Post Offices (first respondent), the petitioner was dismissed from service. Charges 1, 4 and 10 were held not proved; it is pertinent here to note that charge 4 was the most serious of the subsidiary irregularities alleged. Charges 2, 3 and 4 to 9 were held proved. Under the Central Civil (Classification, Control and Appeal) Rules, the petitioner filed a statutory appeal, and in April, 1960 the Director of Postal Services (Second respondent) dismissed the appeal. A petition to the Director-General of Posts and Telegraphs, New Delhi, also failed. The petitioner drew the attention of the authorities to the fact that with regard to charges 2 and 3 which were grave, he had been acquitted by the Sessions Court, of the criminal offences involved, on the very facts. The argument, as submitted by the learned Counsel (Sri Venugopal), for the petitioner might be put in the following form. The findings on charges 2 and 3 are bad, as there have been acquittals, on the sub-

stantial merits, in respect of those charges, by the Court of Session. In the face of these acquittals, a finding to the contrary by a Domestic Tribunal would not be proper, and cannot be permitted to stand. With regard to the remaining established charges, namely, 5 to 9, they are minor misdemeanours altogether, assuming that they were rightly held proved, and that cannot possibly have led any authority to the inference that dismissal would be the appropriate punishment.

The reasoning upon which the argument proceeds has to be carefully stated. In *Jerome D'Silva* v. *Regional Transport Authority*[1] a decision of Rajamannar, C.J., and Venkatarama Ayyar, J., this reasoning appears in part. The most rigorous liability is the liability under the criminal law, for that very reason, a criminal trial proceeds upon principles of safeguard to the accused, and the most searching scrutiny of the facts. Where a man is acquitted upon grave charges arising out of the facts, on the substantial merits, and not merely on some technical plea, such as lack of sanction, it is not in consonance with principles of natural justice that a domestic forum, exercising disciplinary jurisdiction, should come to a different conclusion in Departmental Proceedings, whether before or after the criminal trial. In *Jerome D'Silva* v. *Regional Transport Authority*[1] the matter was expressed in the following form :

> " It would indeed be a strange predicament when in respect of the same offence, he should be punished by one Tribunal on the footing that he was guilty of the offence and that he should be honorably acquitted by another Tribunal of the very same offence. As primarily the Criminal Courts of the land are entrusted with the enquiry into offences, it is desirable that the findings and orders of the Criminal Courts should be treated as conclusive in proceedings before quasi-judicial Tribunals...."

But it is actually a little difficult to state the exact principle upon which such a proposition can be defended. Authorities are not lacking for the view that a mere acquittal by a Criminal Court, does not necessarily absolve the concerned individual from liability, on the same facts, in disciplinary proceedings. Obviously, the principle can never be stated in any absolute or unqualified form. As I earlier expressed, where the acquittal is on a technical ground, or the facts are held established which would justify disciplinary action, but the criminal trial ends in an acquittal, because some necessary ingredient has not been proved beyond reasonable doubt, there might well be a case for contending that the Departmental Authorities could nevertheless punish. But, if, for instance, a man is acquitted of a grave offence, like criminal misappropriation, on the ground that dishonest conversion is not at all made out, it is certainly anomalous that a Departmental Authority should be permitted to differ and to hold that there was such dishonest conversion ; and, further, to inflict punishment on that very basis.

I shall now notice the several authorities that have been cited. In *Dalmer Singh* v. *State of Pepsu*[2] it was held that even where there had been a regular trial, the judgment of the Criminal Court was not necessarily conclusive as regards departmental or disciplinary action. The prosecution might fail for technical reasons. In *Karuppa Udayar* v. *Madras State*[3] Rajagopalan, J., pointed out, with regard to a charge in the Criminal Court under section 420, Indian Penal Code, that the question whether the concerned party could have been prosecuted in a Criminal Court or not, did not affect the jurisdiction of the Revenue Divisional Officer to enquire into the truth of the charges. But, obviously, this decision is peripheral to the main issue. The problem arises where, instead of mere possibility, there is an actual prosecution and acquittal, and the Departmental Authority attempts to punish the officer on the very same facts and charges. *Mohammad Ghouse* v. *State of Andhra Pradesh*[4] is a different matter altogether, for it was contended in that case that the fact that the brother of the petitioner was discharged on a complaint under section 162 of the Indian Penal Code, ought to have been taken into consideration by Government in acting on the charge against him. Obviously, the fact that some other person has been discharged in a criminal case, cannot be conclusive in an administrative enquiry. In *Union of India* v. *Jayaram*[5]

1. (1952) 1 M.L.J. 35.
2. A.I.R. 1955 Pepsu 97 at 99.
3. (1956) 2 M.L.J. 15.
4. A.I.R. 1959 A.P. 497 at 504.
5. (1960) 1 M.L.J. 410 : A.I.R. 1960 Mad. 325 at 326.

Rajamannar, C.J., and Basheer Ahmed Sayeed, J., observed that when there was an acquittal in a Criminal Court, in the absence of any further disciplinary proceedings launched by the Government, the plaintiff, who was under suspension, would be entitled to continue in the employment, and ought to be reinstated.

We may next examine *Mohammad Israil* v. *Sia Saran Sinha*[1], which concerned, the alleged wilful falsification of accounts by one in the position of an accused; the evidence adduced on behalf of the Management, which dispensed with the services of the petitioner, included certified copies of depositions of witnesses examined in the criminal Court. Nevertheless, the Bench held that, though the evidence might not be sufficient for securing conviction in a criminal case, the Management had every justification to deny re-employment, in the context of heavy suspicion relating to the charge. In *Radhakanta* v. *State of Orissa*[2] a Bench of that Court held that the mere fact that the criminal Court did not convict the plaintiff of the charges of criminal breach of trust, cheating and forgery, did not preclude the Department from making a further probe into the matter, as the plaintiff had been acquitted upon the benefit of doubt.

In *P. E. Ponnurangam* v. *Mysore Government R.T. Department*[3], a Bench of that Court held that normally, if a person holding a civil post was found to have committed an offence under the Penal Code, he should be first prosecuted in a criminal Court. If the criminal Court enquires into the charge and acquits the civil servant of the charge, it would be extremely improper for any disciplinary authority to enquire again into that charge, and to hold him guilty of the very offence. In *Radhakrishna Mills Ltd.* v. *The Presiding Officer*[4] as Ramachandra Iyer, J., (as he then was) held that where an employer takes disciplinary action against an employee on the ground that he was guilty of a criminal offence, it is the duty of the employer to accept and treat as conclusive the findings and order of a criminal Court trying that offence. In *Damarali* v. *State*[5], a single Judge of that Court held that a Departmental Authority could not be permitted to sit in judgment over a Criminal Court and that where a Sub-Inspector of Police was prosecuted for causing the death of a suspect, and was honourably acquitted, it is not open to the Departmental Authorities to hold an enquiry into a charge, the substance of which was the assumption of guilt in the criminal case. Under those circumstances, the further proceedings in the departmental enquiry were a nullity. As far as the Supreme Court is concerned, reference might be made to *State of Andhra Pradesh* v. *Sree Ram Rao*[6]. The following passage in the judgment of their Lordships is directly relevant :—

> "The Enquiry Officer appears to have stated that the judgment of the Magistrate holding a Criminal trial against a public servant could not always be regarded as binding in a departmental enquiry against that public servant. In so stating the Enquiry Officer did not commit any error."

In *Delhi Cloth and General Mills* v. *Kushal Bhan*[7] we have this observation, which may be but incidental to the present context :

> "It is true that very often employers stay enquiries pending the decision of the Criminal trial Courts and that is fair ; but we cannot say that principles of natural justice require that an employer must wait for the decision at least of the Criminal trial Court before taking action against an employee".

Ridge v. *Baldwin*[8] is a decision that contains much matter of interest upon the relationship between a conclusion in the exercise of criminal jurisdiction, and the cognizance of it by an administrative authority. The question was whether the Watch Committee who are seized of a matter of termination of employment, were justified in considering, *inter alia*, the observations of Donovan, J., in certain judgments on two indictments. Another aspect of this question will be found examined in *R.* v. *Metropolitan Police Commissioner*[9]. In *General Medical Council* v. *Spackman*[10] the question was whether a Medical Council could regard the decree in a divorce

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1. A.I.R. 1961 Pat. 411 at 412.
2. A.I.R. 1962 Orissa 125.
3. A.I.R. 1962 Mys. 84.
4. (1961) 1 M.L.J. 291.
5. A.I.R. 1959 M.P. 46.
6. A.I.R. 1963 S.C. 1723.
7. (1960) M.L.J. (Crl.) 461 : (1960) S.C.J. 711 : A.I.R. 1960 S.C. 806.
8. (1962) 2 W.L.R. 716.
9. (1953) 2 All E.R. 717.
10. L.R. 1943 A.C. 627.

suit as *prima facie* evidence of adultery. On the basis of the dicta in these decisions, I think that the following principles may be said to emerge.

Firstly, an Administrative Authority, in initiating disciplinary proceedings, is not bound to wait for the verdict of a Criminal Court. But where the Criminal Court has tried the concerned person and acquitted him, it would be improper, and such a proceeding is liable to be quashed as not in consonance with the principles of natural justice, if the Administrative Authority later initiates disciplinary proceedings on the identical facts, and identical charge and records a contrary conclusion. But, of course, the acquittal should have been substantially on the merits ; technical acquittals on grounds like sanction, may not inhibit departmental disciplinary proceedings, or a contrary verdict therein.

Secondly, there could be no rigid or inflexible rule that the finding of a Criminal Court is conclusive, in every sense, upon Administrative Authorities. If the finding is purely a technical acquittal, the Administrative Authority may conceivably punish, on the same facts. It can certainly punish where the acquittal is solely based on lack of sanction or some technical defect in procedure. It could punish, on the same facts, for some lesser charge, which may not amount to a criminal offence, but may well amount to grave dereliction of duty, entailing disciplinary action. For instance, a schoolmaster may be acquitted of a charge of rape alleged to have been committed against a girl-student in his care. But that cannot preclude the Departmental Authority, upon those very facts, from punishing him for grave impropriety in his relationships with the girl students, which disentitles him to that office.

Thirdly, where the acquittal is substantially on merits, identical facts and charges, it will not be proper for a Disciplinary Tribunal to record a finding of guilt, and to punish thereon. This is a basic principle of jurisprudence, and I cannot see that it makes any difference that the Departmental Authority acts before the Criminal Proceedings, or after it. This Court, in exercise of the jurisdiction under Article 226 of the Constitution would be justified in striking down the action based on such findings, as not in consonance with principles of natural justice. Otherwise, grave anomalies might follow as stressed by Rajamannar, C.J. and Venkatarama Ayyar, J., in *Jerome D'Silva* v. *Regional Transport Authority*[1].

Applying these criteria to the present facts, it is clear that the conclusions on charges 2 and 3 have to be struck down, and that only certain minor irregularities remain established. Even so, the question is, whether this Court could interfere, where the dismissal could be justified on some of the charges proved. That matter was examined in detail by the Supreme Court in *State of Orissa* v. *Bidyabushan*[2] and the impact of this decision has been analysed by Jagadisan, J., and myself in *State of Madras* v. *Srinivasan*[3]. As we have pointed out, the findings that remain should be as to "substantial misdemeanours," to justify the argument that this Court will not interfere with the punishment imposed in the case (dismissal), though the officer is cleared in respect of certain charges. Applying this test, in the present case, very minor irregularities alone remain, with the exception of charge 4, in respect of which the petitioner was acquitted, which are not "substantial misdemeanours" in any conceivable sense, and for which it is impossible to imagine that any authority, exercising disciplinary jurisdiction, would have imposed the punishment of dismissal on those charges. In this view, I allow the writ petition, quash the order of dismissal, and release the matter for fresh determination, in the light of the charges which alone remain established against the writ petitioner, namely, charges 5 to 9. The parties will bear their own costs.

V.S. *Petition allowed ; dismissal order quashed.*

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1. (1952) 1 M.L.J. 35.
2. (1962) 2 S.C.J. 613.
3. (1964) 2 M.L.J. 353: 1964 M.L.J. (Crl.) 582 : I.L.R. (1964) 1 Mad. 685.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Lakshmi Ammal and another .. *Petitioners**

v.

The Board of Revenue, Madras represented by the Commissioner of Land Revenue, Madras .. *Respondent.*

Assignment of Porambokes—Policy directions given by Government—Board's Standing Orders regarding assignment of land—Revocation of assignment without giving an opportunity to the affected party and in disregard of G. Os. governing the same—Validity.

Orders regarding assignments of land or their revocation are disposed of in a quasi-judicial manner and the Board's Standing Orders provide for a hierarchy of appeal and revisional tribunals indicating that such rights are dealt with on such basis. Where the subject-matter of an assignment is governed by several Government Orders and directions laying down the general policy to be observed in assigning lands or revoking assignments already made, any order which seeks to dispossess a person of the lands assigned to him without considering any of the relevant data can hardly be said to comply with the requirements of a quasi-judicial disposal. It cannot be said that such orders are administrative orders.

Where a quasi-judicial Order does not consider the applicability of the relevant Government Order issued in that regard, and the affected party is not given adequate opportunity to put forward his contention, the order is liable to be quashed.

Petition under Article 226 of the Constitution of India, praying that in the circumstance stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a Writ of *Certiorari* calling for the records in proceedings B.P.R.T. 4871 on the file of the Board of Revenue, Madras and quash the said order therein.

K. S. Ramabhadra Iyer, for Petitioner.

S. Mohan, for the Additional-Government Pleader on behalf of the State.

The Court made the following

ORDER :—The petitioners are the widow and the son of one late Seshadrinatha Iyer, an Amin, who served in the First World War in the year 1941, this Seshadrinatha Iyer obtained assignment of a portion of the land in S. No. 326/1, a poramboke in Therkukadayam Village. According to the petitioners, there was an assignment, but the order of grant is not forthcoming. At the time of the grant, the land was waste cultivable land which Seshadrinatha Iyer is said to have brought under cultivation after spending a consideable amount. In 1944, under the Grow More Food Campaign, permission was granted to convert the land to wet. Wet cultivation had been going on on this land since then. Seshadrinatha Iyer died in 1952. It appears that in 1955, the Board of Revenue treated this as an encroachment. This survey number is part of the water spread of a tank. Proceedings in eviction were undertaken. The Board declined to accept the contention of the petitioners that the cultivation of the land was unobjectionable. The Board however instructed the Collector to take steps to assign some other unobjectionable land to the petitioners, as, in the opinion of the Board, an extent of 92 cents in the occupation of the petitioners could not be permitted to be used for purposes of cultivation. This proceeding led to the filing of a writ petition before this Court. During the pendency of that writ petition, attempts were made by the petitioners to move the Board of Revenue to examine the matter afresh. It appears that the Board was agreeable to do so and in those circumstancs the writ petition before this Court was not pressed and it was accordingly dismissed. A further petition was presented to the Board of Revenue, but finally, the Board declined to interfere on behalf of the petitioners. The petitioners complain that having regard to the circumstances under which the occupation of the land by Seshadrinatha Iyer and subsequent y by them had been permitted, the order of the Board, which was made without giving an adequate opportunity to the petitioners, is arbitrary, unjust and opposed to natural justice.

* W.P. No. 1330 of 1961. 10th February, 1964.

It is pointed out that several Government Orders, have been issued with regard to the cultivation of tank-bed lands and Government have laid it down as a policy that even lands so assigned to landless poor persons should not be taken away from them. These Orders of the Government have been ignored by the Board and in that view the Board's order is also attacked as illegal.

In the counter-affidavit filed on behalf of the Board of Revenue, it is stated that an application for assignment made by Seshadrinatha Iyer in 1941 in S.No. 326/1 was rejected, but subsequently, the applicant was granted permission to cultivate the land temporarily under the Grow More Food Rules. It is claimed that on complaints from ayacutdars in Fasli 1362, the matter was enquired into and the Collector held the occupation to be objectionable. This was in 1954. These eviction proceedings led to W.P. No. 83 of 1958 before this Court which was not however pressed. On further representation made by the petitioners, the Board directed re-examination by the Collector. It finally found that the eviction proceedings could not be interfered with. It is alleged on behalf of the respondent that the matter was considered carefully and that these are administrative orders which cannot be challenged in a writ proceeding. There is, however no specific case with regard to the various Government Orders to which the petition refers, according to which the petitioners claim that the occupation of this land by the landless poor persons should not be disturbed.

A reply affidavit has been filed by the petitioners. It is denied by the petitioners that the land was permitted to be occupied under the Grow More Food campaign. Long before this Grow More Food campaign, Seshadrinatha Iyer was granted permission by an order of the Collector dated 31st August, 1942, to occupy the land under certain conditions. At that stage he was permitted to grow dry crops only. In 1944, however, he was permitted to convert the land into wet and to raise wet crops. It is again averred in this reply affidavit that recent circulars of the Government and the Board of Revenue which directly apply to this case have been completely ignored. It is the further contention of the petitioners that Madras Act III of 1905 has no application, for the petitioners have never been in unauthorised occupation of the lands.

Mr. Ramabhadra Iyer, learned Counsel for the petitioners, frankly concedes that he is unable to maintain that there was a regular assignment of the land in favour of Seshadrinatha Iyer in 1941. The earliest order in relation to this land that is available is the order of the Collector dated 31st August, 1942, whereby Seshadrinatha Iyer was allowed to cultivate temporarily 1 acre 13 cents in S.No. 326/1. One of the conditions imposed was that the land should be cultivated only with dry food crops. On that occasion, the land appears to have been inspected by the Revenue Inspector, whose report, dated 9th October, 1941, was to the effect that the portion lies at the western side of the tank and is away from the waterspread of the tank. This portion is surrounded on the north, west and south by wet fields and by the tank on the east. The tank is a minor irrigation source. The ayacutdars under the tank had no objection to the assignment. The Revenue Inspector specifically stated that

"the portion applied for cannot be utilised for improving the capacity of the tank at any later date without detriment to the ayacut lands on the three sides and this is not at all within the waterspread. So, there is no objection to assign the lands to the petitioner taking into consideration the military service of the petitioner..............after transferring the extent from tank poramboke to *Anadhi*."

In 1957, the Minor Irrigation Supervisor again inspected the site and made the following report:

"From the levels furnished above, it is very clear that the encroachment is......2" below the F. T. L. of the tank, whereas the adjoining fields surrounding the encroachment are a little more below the F. T. L. of the tank. The ayacutdars of the tank do not store the water to the F.T.L. as a large extent of the foreshore wetlands are liable for submersion."

He further pointed out that the supply to the tank was through two channels, that the supplies were perennial and that the ayacutdar bring their entire ayacut to cultivation without storing water to F.T.L. On calculation he pointed out that

the quantity of water that the tank would be deprived of by the encroachment if the F.T.L. is restored is only 7,478 c.ft. or 0-08 m.c.ft. which is very much negligible when compared to the storage capacity of 2.48 m.c.ft. of the tank. He accordingly had no objection to that assignment.

As long back as in 1949, Government issued an order to the following effect :

> " Government are receiving numerous complaints that lands leased to ex-service-men under the G. M. F. scheme are being taken away from them and assigned to political sufferers. The attention of all Collectors is invited to the instructions in para. (3) (4) of G.O. No. 1523, Revenue, dated 11th June, 1949. They are informed that ex-service-men who are in occupation of the lands under the G. M. F. scheme or otherwise should under no circumstances be dispossessed of their lands, if they are landless poor as defined in the G. O. referred to above. They may be assigned such lands in accordance with the instructions in para. 3 (4) of the G. O."

The G.O. referred to dealt with the assignment of land in respect of which a ban had been previously imposed. The ban was lifted by this G.O. and instructions with regard to permanent assignment were issued under this Government Order. It was pointed out in this G.O. that isolated plots of land at the disposal of the Government should be assigned (1) to political sufferers, (2) ex-service-men of the Second World War, and (3) landless poor persons, in that order of priority. Paragraph 3 is important. Herein, as a general policy, the Government directed all unauthorised occupants to be evicted, no matter how long they have held the lands under *sivaijama* occupation. The exceptions to this rule were in the case of landless poor persons. Sub-paragraph (4) reads thus :

> " In paragraph 5 of G. O. No. 999, Revenue, dated 28th April, 1948, the Government ordered that very poor persons holding lands under Grow More Food leases should not be evicted on the expiry of the lease period but permitted to continue in occupation. The expression " very poor persons " will have the same meaning as landless poor person. The Government direct that lands held under lease by such persons may be assigned to them up to an extent of 5 acres of wet or 10 acres of dry land. . . . Land held on lease in excess of these limits may be taken away from them on the expiry of the lease period and assigned to others."

Under a note to this paragraph, it was required that the permission of the Government should be obtained before assigning the tank bed lands or grazing ground porambokes.

That the petitioners in this case qualify under the expression " landless poor persons " is not denied.

A circular was issued by the Board of Revenue in 1961 dealing with the assignment of lands which had been originally granted under the Grow More Food Campaign. It was pointed out herein that in certain cases the lessees, had spent considerable amounts on reclamation and that in such cases the policy of the Government was to allow occupation till the lessees were able to recoup, their investment, if they are not landless poor persons. But, when the occupants are landless persons, the Government's directions contained in the G.O. of 1949 that the occupants should be assigned the land had to be followed. The Board specifically drew the attention of the Collectors to the G.O. referred to.

That the petitioners had been in occupation of this land under a properly granted permission by the appropriate authority is not denied. Whether the original permission was prior to the introduction of the Grow More Food scheme or not is immaterial, for the learned Additional Government Pleader does not deny that the occupation of this land by Seshadrinatha Iyer and subsequently by the petitioners was permitted only under the Grow More Food scheme even in 1941. It was found that the occupation of the lands was unobjectionable as the level of the land was only 2" below the full tank level of the tank and the ayacutdars were particular in saying that the tank was never filled to its full capacity as it would submerge other wet fields. It was also pointed out by the learned Counsel for the petitioner that fields on the three sides surrounding the petitioner's field were even lower in level and despite that feature they had been assigned. According to the learned Counsel, all of these relevant features were not at all considered, more particularly the Government Orders of 1949 and even the Board's proceedings of 1961 dealing

with such occupation. The question is whether an order made in these circumstances stands vitiated and has to be quashed.

I am unable to accept the contention of the respondent that these are administrative orders which cannot be the subject-matter of a writ proceeding. It is well recognised that orders regarding the assignment of lands are disposed of in a quasi-judicial manner and even the rules contained in the Board's Standing Orders directed the disposal of application for assignment in such manner. The rules also provide for a hierarchy of appeal and revisional tribunals indicating very clearly that the right agitated is in fact dealt with on at least quasi-judicial basis. In this particular case, it is beyond dispute that the petitioners have been in permissive occupation of the land for nearly twenty years. As landless poor persons, they are entitled to certain privileges and an application for assignment is covered by the Government Orders and the Board's proceedings themselves. The order of the Board of Revenue does not deal with any of these aspects. Had the petitioners been given an opportunity of being heard, they could at least have placed these matters before the Board. An order which disposess of the revision petition of the petitioners without considering any of the relevant data can hardly be accepted as complying with the normal requirements of a quasi-judicial disposal. It may be that by reason of the fact that the land is a part of the recognised tankbed its occupation is *prima facie* objectionable. But the Government Order recognises that even tankbed lands could be assigned subject to certain conditions. I have already referred to the reports of the Revenue Inspector and the Minor Irrigation Supervisor in this regard. Neither the counter-affidavit of the respondent nor the arguments before me serve to indicate that the position as reported by those technical authorities has in any way altered at the present time.

Mr. Ramabhadra Iyer, learned Counsel for the petitioners, repeatedly stated that the petitioners were willing to give up the land if the land was acutally needed for the purpose of enlarging the tank or such other purposes. I am not concerned with that aspect of the matter. In the exercise of the writ jurisdiction, I can only examine whether the impugned order was made after observing the required procedure and whether the authority has taken into consideration all the relevant material that it should. In my view, there has been a failure to examine the applicability of the Government Order of 1949 and the Board's proceedings of 1961 in relation to this case. There has also been a failure to furnish an adequate opportunity to the petitioners to meet the contentions brought forward against their occupation of the lands.

For these reasons, the order is liable to be and is hereby quashed. The Board will in justice to the petitioners re-hear the matter in the light of the above observation and make such orders as would be appropriate. There will be no order as to costs.

R.M. ——— *Order set aside; matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE T. VENKATADRI.

Karuppu Udayar .. *Appellant**

v.

State of Madras by the Secretary, Revenue Department and three others .. *Respondents.*

Civil servant—Conduct of—Departmental enquiry conducted by a particular officer—Succeeding officer deciding the case on the evidence recorded by his predecessor—If opposed to principles of natural justice—Prejudice to the party—When to be pleaded.

Conduct of trials by a succeeding judge from the stage at which it was left by his predecessor is not new either under the Civil Procedure Code or Criminal Procedure Code. It cannot be other-

*W. A. No. 28 of 1963. 15th April, 1964.

wise in departmental enquiries. In the absence of any specific provision of law or rule requiring that the officer ultimately passing the final order in a departmental enquiry should be the same person who has himself examined the witnesses, it cannot be said that an order passed by a succeeding officer based on proper evidence recorded by his predecessor is in any way opposed to the principles of natural justice. The contention that the officer passing the final order did not have the advantage of watching the demeanour of the witnesses proceeds on the incorrect assumption that the impression gathered by the demeanour of the witnesses will be alway to the advantage of the party against whom the enquiry is held. The question whether the impression gathered from the demeanour of a witness will be, from the point of view of the person charged, an advantage or disadvantage depending on the circumstances of each case, is one for him to put forward at the appropriate time and ask for a re-call of the witness if necessary. It is not open to him to complain, after the enquiry is over, that the witness should have been examined *de novo* by the succeeding officer especially where the records clearly show that the person charged did not object to the continuation of the proceedings by the succeeding officer from the stage at which it was left by his predecessor.

Unless the law imposes a duty or a prescribed procedure that a departmental enquiry should be finally decided by one and the same officer who received the evidence, there is no violation of the principles of natural justice merely because in an administrative enquiry part of the evidence was recorded by one officer and the rest by another or that the actual decision was given by a succeeding officer based on the evidence recorded by his predecessor.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Veeraswami dated 20th March, 1962, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1232 of 1959, presented under Article 226 of the Constitution of India to issue a Writ of *certiorari* calling for the records in the proceedings R.O.C. No. 13630/56 dated 13th January, 1957, on the file of the Revenue Divisional Officer, Salem, as confirmed by the 3rd, 2nd and 1st Respondents in their orders of 25th March, 1957, 28th September, 1957 and 3rd May, 1958, respectively and quash the said orders therein.

V. P. Raman, for Appellant.

S. Mohan for the Additioal Government Pleader on behalf of the State.

The Judgment of the Court was delivered by

Ramachandra Iyer, C.J.:—This is an appeal against the judgment of Veeraswami, J., rejecting the application filed by the appellant for the issue of a Writ of *certiorari* to quash the order of the Revenue Divisional Officer, Salem, dismissing him from service. The appellant was a permanent Karnam of Kamakkapalayam Village in Athur Taluk in Salem District. On receipt of complaints against him, certain charges were framed by the Revenue Divisional Officer, Namakkal, and after an enquiry he was dismissed from service. That order formed the subject-matter of W.P. No. 8 of 1954 in this Court. It was found that inasmuch as a second opportunity was not given to the appellant, the order of dismissal was illegal. Thereupon the Revenue Divisional Officer reinstated the appellant and recommenced the enquiry in regard to the original charges. Four witnesses were examined in support of the charges. Shortly thereafter, Athur Taluk came under the jurisdiction of the Revenue Divisional Officer, Salem. He, after having come to a tentative conclusion that the appellant was guilty of the charges, issued on 17th December, 1956, a notice calling upon him to show cause why he should not be dismissed from service. The appellant submitted his explanation. Not being satisfied with it, the Revenue Divisional Officer, Salem, passed an order dismissing him from service. This was on 13th January, 1957. The appellant took the matter by way of appeal to the Collector and then to the Board of Revenue but without success. A Revision Petition to the Government was equally futile. He then applied to this Court under Article 226 of the Constitution for quashing the order of dismissal. Veeraswami, J., dismissed that application. Hence this appeal.

The only point taken by Mr. V. P. Raman in support of the appeal is that as the Revenue Divisional Officer, Salem, who passed the order of dismissal, did not conduct the entire enquiry, he had not the advantage of personally watching the demeanour of the witnesses whose evidence had been recorded by the Revenue

Divisional Officer, Namakkal, and, therefore, the conclusion reached on the basis of such recorded evidence must be held to be vitiated by non-observance of rules of natural justice. This contention proceeds on an assumption which can hardly be accepted as correct. For one thing, it might not always be to the advantage of the person charged that the officer conducting the enquiry should be swayed by the impressions created by the demeanour of witnesses. For example, if the witnesses who gave evidence in support of the charge and created a good impression on the enquiring officer, it would be a matter of disadvantage rather than advantage to the person charged, that his case should be decided on the impressions so gathered. Therefore, if there be a change of the enquiring officer during the trial, it cannot be said that it would be invariably a case of disadvantage of the persons proceeded against. Equally, there may be cases where witnesses create such a bad impression, that it would be in the interests of the person charged that the officer hearing the evidence should deal with the case finally. The question whether the impression gathered from the demeanour of witnesses, will be, from the point of view of the person charged an advantage or disadvantage, depending on the circumstances of each case is one for him to put forward at the appropriate time and ask for a recall of those witnesses. Whereas in the present case, the person charged did not require that the new officer conducting the enquiry should recall the witnesses examined by his predecessor, one can reasonably infer that he thought that it would be to his disadvantage if they were recalled. Allowing the succeeding officer to continue the enquiry from the stage it was left by his predecessor, would mean that the person against whom the enquiry was conducted deliberately took the chance of the enquiry being continued from where it was left culminating in his favour. It should not be open to such a person, after the enquiry is over, to complain that the witnesses must have been examined *de novo* by the Officer. In *Manak Lal* v. *Dr. Prem Chand*[1], there was an allegation that there was bias in a member of the Tribunal conducting the enquiry against an Advocate, under the Bar Councils Act. No objection was taken by the Advocate to the presence of that member in the Tribunal, even though he was aware of the circumstances giving rise to the allegations about the bias and of his right to challenge the presence of the member in the Tribunal. Later, however, the constitution of the Tribunal was sought to be challenged on the ground of bias in one of its members. The Supreme Court held that, in the circumstances, there was deliberate waiver on the part of the Advocate of the objection to the constitution of the Tribunal and he could not be later allowed to raise it. That principle will apply with equal force to the present case, where the appellant did not require the Revenue Divisional Officer, Salem, not to continue the enquiry at the stage left by his predecessor but to recall the prosecution witnesses. Even apart from that, we are of opinion that there can be no infringement of the rules of natural justice for the mere reason that the officer who ultimately decided the case did so, on the evidence recorded by his predecessor. Conduct of trials by a succeeding Judge from the stage at which it was left by his predecessor, is recognised by the Code of Civil Procedure. It is not unknown in the trial of criminal cases also. It cannot be otherwise in departmental enquiries. In matters like the present, where the administrative enquiry is of a quasi-judicial nature, what the person in the position of the appellant would be entitled to is that the enquiry should be conducted with due regard to the rules of natural justice. In *Union of India* v. *T. R. Varma*[2], the Supreme Court indicated the scope of such rules in their application to departmental enquiries. The following passage in that judgment will be useful :

> "Stating it broadly and without intending it to be exhaustive, it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witnesses examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them."

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1. (1957) S.C.J. 359 : (1957) M.L.J. (Crl.) 254 : (1957) S.C.R. 575.
2. (1958) S.C.J. 142 : (1958) 1 An.W.R. (S.C.) 67 : (1958) 1 M.L.J. (S.C.) 67 : (1958) M.L.J. (Crl.) 123.

There are no rules in the present case which require that the officer ultimately passing the final order, as a result of the departmental enquiry, should have himself examined all the witnesses. The rule of natural justice to which we have just now made reference does not require that the evidence recorded in one part of the enquiry by one officer cannot be used by his successor who completes the enquiry, so long as such evidence was taken in the presence of the person charged after giving him a fair opportunity to cross-examine those witnesses. It is accepted in the insant case that reasonable opportunity had been given to the appellant at all stages of the enquiry.

Mr. V. P. Raman, however, invited our attention to a passage in H. H. Marshall's book on "*Natural Justice*" (1959) edition, at page 57, wherein it is stated :

> "Where an inquiry is commenced by one Magistrate and completed by another, the second Magistrate cannot commit upon evidence given before the first. The judicial discretion which a Magistrate has to exercise in cases brought before him must be based upon the evidence taken before him, and it is not competent for him to act upon evidence taken before another Magistrate."

> The case of *Munday* v. *Munday*[1], is also of interest. The hearing of an application by a husband to vary an order for the maintenance of his wife which had previously been made against him was spread, owing to adjournments, over three separate days. Three Justices were present on the first day, the same three with two additional Justices on the second day, and on the third day the first three Justices were absent, and the matter was heard by the second two Justices and another Justice who had not been present previously. "It was held" that there must be a re-hearing before an entirely fresh panel of Justices and different Clerk, for there had been a failure to comply with the mandatory provisions of section 98 (6) of the Magistrates' Courts Act, 1952."

But it will be plain from the passage extracted above, that there was a statutory requirement in those cases which made it obligatory on the Magistrate recording the evidence to give judgment. *Rex* v. *Huntingdon Confirming Authority*[2], related to the validity of an order of the Confirming Authority which was made without notice to the parties. The order was held to be a nullity. In *Whittle* v. *Whittle*[3], there was a maintenance order against the husband in favour of his wife. Summons was taken out by the former to revoke it. One of the members of the Bench did not attend the enquiry for a day when a number of witnesses upon the wife's misconduct were cross-examined and some other witnesses were also examined. Although that evidence was read over the next day, it was held that the procedure adopted was irregular ; the finding of the Justices was therefore set aside. But that case related to an appeal from the order revoking the previous maintenace order. The finding of the appellate Court was rested on the familiar principle that the value of a finding of fact by a trial Judge depended on the peculiar opportunity available to him of watching the demeanour of the witnesses in the box and seeing the way in which the evidence was given. The appellate Court said that the conclusion which was reached on a mere reading of the recorded evidence by the trial Court would not be such as would enable the appellate Court to place that amount of reliance on the trial Court's judgment which it would otherwise have done.

Learned Counsel for the appellant placed considerable reliance upon the observations of the Supreme Court in *G. N. Nageswara Rao* v. *A. P. S. R. Corporation*[4], where it was observed :

> "While the Act and the Rules framed thereunder impose a duty on the State Government to give a personal hearing, the procedure prescribed by the Rules impose a duty on the Secretary to hear and the Minister to decide. This divided responsibility is destructive of the concept of judicial hearing. Such a procedure defeats the object of personal hearing. Personal hearing enables the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned argument to accept his point of view. If one person hears and another decides, then personal hearing becomes an empty formality. Therefore the said procedure followed in this case also offends another basic principle of judicial procedure."

As Veeraswami, J., has pointed out those observations relate to a case where the Statute and the Rules made thereunder prescribed a particular procedure and that

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1. (1954) 1 W.L.R. 1078.
2. L.R. (1929) 1 K.B. 698.
3. (1939) 1 All E.R. 374.
4. (1959) S.C.J. 967 : (1959) 2 M.L.J. (S.C.) 156 : (1959) 2 An.W.R. (S.C.) 156 : A.I.R. 1959 S.C. 308.

such procedure was contravened in that case. There the law imposed a duty on the authority to give a personal hearing ; it was held that it would not be open to that authority to delegate the enquiry to some other authority. This principle is different from the one with which we are now concerned. Here is an administrative enquiry on certain charges made against a subordinate. Part of the evidence was recorded in his presence by one officer and the rest of it was recorded by another officer. Both sets of evidence were recorded in the presence of the person charged. Every opportunity was given to him to cross-examine the witnesses. Nothing more was required to be done under the Rules or under any principle of natural justice. The mere fact that the previous officer might have gathered certain impressions about the witnesses examined by him and those impressions would not be available to the second officer, cannot by themselves amount to an abrogation of any principle of natural justice. As we pointed out at the beginning, we are by no means sure that the appellant suffered any disadvantage by reason of the change in the personnel of the enquiring officer. If there had been such a disadvantage, he would have certainly apprised the succeeding officer of the same and insisted upon recalling the witnesses already examined. This he never did.

Therefore, there is no substance in this appeal which will be dismissed with costs.

R.M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTHI.

P. Ramachandra Sastri .. *Petitioner**

v.

S. Mohamed Hussain .. *Respondent.*

Civil Procedure Code (V of 1908), Order 21, rule 101—Re-delivery of possession—When could be claimed—Order 21 rule 35—Order against tenant—If could be executed against sub-tenant not a party to the order of eviction.

In a summary enquiry for restoration to possession under Order 21, rule 101, a person who has been dispossessed has got only to establish that he was in possession of the property on his own account or on account of some person other than the judgment-debtor.

No doubt a decree for possession obtained against a tenant can be straightaway executed, as against the property in the hands of the sub-tenant, even though the sub-tenant was not a party to the proceedings in which the order of eviction was passed. They will be persons bound by the decree within the meaning of Order 21, rule 35, Civil Procedure Code.

But in the instant case the landlord executing his decree for eviction did not accept that the person in actual possession was a sub-tenant and the person evicted claimed that he was a direct tenant under the landlord, in either case the possession will be on his own account and not on behalf of the judgment-debtor within the meaning of Order 21, Rule 101. Restoration of possession must therefore be ordered in the circumstances.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Coimbatore dated 6th February, 1962, and made in C.R.P. No. 1309 of 1962 (E.A.No. 1277 of 1961 in E.P. No. 650 of 1961 on the file of the District Munsif's Court, Coimbatore in R.C. O. P. No. 165 of 1961).

M. R. Krishna Iyer, for Petitioner.

T. R. Ramachandran and *R. Sivapunniayan*, for Respondent.

The Court delivered the following

JUDGMENT :—This Revision Petition arises out of an application filed by the petitioner for re-delivery of possession of the property under Order 21, rule 101 of the Code of Civil Procedure. The respondent obtained an order for eviction under the Madras Rent Control Act against his tenants and in execution of that decree for eviction, the petitioner was dispossessed of a portion of the permises in question.

*C.R.P. No. 972 of 1962. 2nd December, 1964.

The petitioner's complaint is that, despite his objection, the amin dispossessed him removing and throwing away his samans which he had kept in the premises. In his application for restoration, the petitioner stated that he was occupying the premises as a tenant under the landlord and that, as he was not made a party to the eviction proceedings he was not liable to be evicted in execution of the decree for eviction passed against other persons. The respondent filed a bald objection statement in which he merely denied the actual dispossession. It is significant that the respondent did not state in what capacity or right the petitioner was in possession of the premises when the amin dispossessed him. One thing that is perfectly clear from the record is that the petitioner was in possession of the portion of the premises as claimed by him and he was actually dispossessed by the amin who removed and threw away the petitioner's samans. This conduct of the amin, I am told, formed the subject-matter of some other enquiry before the learned District Munsif and some decision has been rendered therein. We are not concerned with that enquiry. The petitioner has failed before the District Munsif, the appellate authority and the Court of revision. As the perspective of approach of the authorities referred to above is clearly erroneous and as I am satisfied that they have misdirected themselves, I have no hesitation in setting aside the order and directing restoration of the property to the petitioner. It is settled law that a decree for possession obtained against a tenant can be straightaway executed as against the property in the hands of sub-tenant, even though the sub-tenant was not a party to the proceeding in which the order for eviction was passed. It is sufficient to refer to the Bench decision of the Calcutta High Court in *Yusuf* v. *Jyotishchandra Banerji*[1]. In that case it was held that a sub-tenant of a lessee is not a necessary party in a suit for ejectment brought by the superior landlord and that when a landlord obtains a decree for ejectment on forfeitue or determination of the lease by notice against his tenant, the latter's sub-tenants in actual possession of the premises are " persons bound by the decree " within the meaning of Order 21, rule 35, Civil Procedure Code. This statement of the law has been approved by the Supreme Court in *Gurushiddaswami* v. *D. M. D. Jain Sabha*[2]. The landlord in this case however did not accept the position that the petitioner was a sub-tenant occupying the premises. At the same time, the petitioner claimed that he was a tenant directly under the landlord. If the petitioner's case that he is a tenant under the landlord is not established, the tenant would only be a trespasser in view of the fact that the landlord did not and would not accept the position of the petitioner as a sub-tenant in the premises. In either case, it will be clear that the possession of the petitioner will be on his own account and not on behalf of the judgment-debtor within the meaning of Order 21, rule 101. It must be noticed that in a summary enquiry for restoration of possession, a person who has been dispossessed has got only to establish that he was in possession of the property on his own account or on account of some persons other than the judgment-debtor. In view of the halting position taken up by the respondent, I have no doubt that the petitioner has satisfied the conditions of Order 21, rule 101, for obtaining re-deliverey of the property. This of course does not involve any adjudication of other rights and obligations which may subsist, as between the parties. The respondent's right as against the petitioner treating him as a tenant direct under the respondent or as a trespasser do not form the subject-matter of the present adjudication. The respondent may pursue his own remedies, as he may be adivsed in appropriate proceedings.

The Revision Petition is allowed with costs.

R.M. *Revision allowed.*

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1. (1932) I.L.R. 59 Cal. 739.
2. (1953) S.C.J. 730 : (1953) 2 M.L.J. 819 : (1954) S.C.R. 235 : A.I.R. 1953 S.C. 514.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

Kaliammal and another .. *Appellants**

v.

Andiammal and another .. *Respondents.*

Hindu Succession Act (XXX of 1956), sections 14 (1) and 2—Applicability and scope of—Deed by Hindu giving directions as to the disposal of his properties—Allotment of certain properties to wife for life and to daughter after her death absolutely—Death of settlor and thereafter of daughter unmarried—Estate taken by settlor's wife—Limited or absolute estate—Sale of properties by widow to stranger—Validity—Right of reversioners to challenge.

K, a Hindu, gave directions to his wife *A* (1st defendant) as to the disposal of his properties in a deed under which certain properties were allotted to his wife *A* and his minor daughter *V* ; *A* was to take a life-estate without any power of alienation and after her death his daughter *V* was to take them absolutely, certain other properties were to be taken by *K*'s mother, step-mother, sister and sister's son. The deed was called a partition deed, though in fact it was not and could not be a deed of partition known to the Hindu law.

K died leaving his wife and daughter and his mother, step-mother, sister and sister's son and thereafter *A* entered into possession of the properties allotted to her and the mother, step-mother, sister and sister's son entered into possession of the properties allotted to them. *V*, the daughter, died unmarried and subsequently *A* executed a deed of surrender in her own favour referring to the death of *V* her daughter and asserting her absolute ownership in the properties. The very next day she executed a sale deed in favour of the second defendant, a stranger, in respect of the properties allotted to her and her daughter. The plaintiffs (sister and sister's son) brought a suit challenging the validity of the sale deed as not binding on them as they were *K's* reversioners pleading that the first defendant had only a widow's estate in the properties under the partition deed, by virtue of section 14 (2) of the Hindu Succession Act and had no authority to dispose of the properties.

The defence was that *V* had a vested remainder given to her absolutely and on her death unmarried that estate vestd in her mother *A* as a full owner and she had full power of alienation that therefore the sale was perfectly valid, that the second defendant was a *bona fide* purchaser for good consideration and had entered into possession of the properties as such.

Held, (1) The partition deed so called was not a partition at all, and even without it *A* would take the properties and would take an absolute estate under section 14 (1) and the *Explanation* thereto of the Hindu Succession Act ;

(2) Assuming that *A* got only a life estate under the 'partition deed' when she succeeded to her unmarried daughter on the latter's death as her heir, she became the absolute owner and was competent to alienate the properties as she liked ; and

(3) Therefore, the sale deed executed by her in favour of the second defendant was perfectly valid and binding on the plaintiffs (reversioners) and was not open to challenge by them.

(4) The second defendant being a *bona fide* holder for valuable consideration, was entitled to protection.

Appeal against the decree of the District Court, Coimbatore, in Appeal Suit No. 191 of 1960, preferred against the decree of the Court of the Subordinate Judge (Prl.) Coimbatore, in Original Suit No. 241 of 1957.

R. Gopalaswami Ayyangagar, Vedantam Srinivasan and *V. Aravamudhan,* for Appellant.

R. Ramamurthi Ayyar, for Respondent.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit filed by the appellants for a declaration that the sale deed dated 19th September, 1957, executed by the first respondent herein in favour of the second respondent was not valid and binding on them (appellants).

The appellants are the reversioners of deceased Kaliappa Goundar. This deceased was the husband of the first defendant. He died leaving behind his widow, the first defendant (first respondent), his only daugheter, Valliammal, his mother, step-mother, his sister and his sister's son. The sister and sister's son are the appellants (plaintiffs). The deceased Kaliappa Gounder gave directions to his wife Andiammal to divide his properties and in pursuance of such directions came into

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*Second Appeal No. 82 of 1962. 4th December, 1964.

existence a partition arrangement, Exhibit A-1, in and by which the plaint A schedule properties were allotted to the first defendant and her daughter. In the partition deed, it was stated that the first defendant would get only a life estate, that is, she was to enjoy the properties during her lifetime without any power of alienation and, after her death, it was to go to her minor daughter Valliammal. After the death of Kaliappa, the first defendant entered into possession of the A schedule properties. Subsequently, her minor daughter, Valliammal, died unmarried. Subsequently, on 18th September, 1957, the first defendant executed a registered deed of surrender in her own favour referring to the death of her minor daughter and asserting her absolute ownership of the properties. The very next day, the first defendant, that is the widow of Kaliappa, executed a sale deed, which is the subject-matter of discussion in this appeal, to the second defendant (second respondent) for Rs. 20,000. It is this sale deed which the reversioners-appellants are attacking as not valid and binding on them.

The defence was that the suit was vexatious and unsustainable at law, that, as per the registered partition deed, Exhibit A-1, Valliammal had a vested remainder without any restriction, that on Valliammal's death as unmarried minor, the vested remainder immediately vested in the first defendant as heir of Valliammal, that after the death of her unmarried daughter, she became the full owner of the properties, since she inherited the estate of her minor daughter, though she was given only a life estate in the partition deed. Nevertheless, she executed the surrender deed thereby declaring her intention that she had become the absolute owner of the properties, as heir of Valliammal. The second defendant adopted the written statement of the first defendant and further added that he was a *bona fide* purchaser for cash consideration of Rs. 20,000 and also in possession of the suit properties, and that the plaintiffs had no manner of right or title in them.

The Courts below found that the sale deed executed by the first defendant in favour of the second defendant was valid and binding on the plaintiffs-appellants, as she was the absolute owner of the properties, that the second defendant was a *bona fide* purchaser for value and that the plaintiffs were not entitled to the declaration prayed for. It is against this judgment and decree, that the plaintiffs have preferred the Second Appeal.

Learned Counsel for the appellants reiterated the same arguments advanced in the Courts below, that the first defendant had no manner of right or title in the suit property except a life estate, and as life estate-holder she could not execute the sale deed in favour of the second defendant. Learned Counsel further contended that according to section 14 (2) of the Hindu Succession Act, XXX of 1956, if a female Hindu acquires property under a gift or will or any other instrument, she takes the property according to the terms of the deed and does not become its full owner. In other words, she gets a restricted estate, even though under sub-section (1) of section 14, any property possessed by a female Hindu, whether acquired before or after the commencement of the Act, would be held by her as full owner thereof and not as a limited owner. Thus, there was a controversy in the Courts below whether, by virtue of the partition deed, Exhibit A-1, the first defendant took only a restricted estate under section 14 (2) of the Act.

Exhibit A-1, no doubt, is called a partition deed, in and by which directions were given by Kaliappa, the husband of the first defendant, that A schedule properties should be enjoyed by his wife and daughter and B schedule properties should be enjoyed by his mother, step-mother, sister and nephew. Even without this partition deed, the first defendant could have inherited the properties of her husband, on his death. Further, the *Explanation* to sub-section (1) of section 14 clearly states that the property acquired by a woman in a partition would become her absolute property, after the passing of the Act. Exhibit A-1 cannot strictly be called a partition deed, because the parties mentioned therein are not all members of the joint family of Kaliappa. In the partition deed, he had included his sister and sister's son, and they cannot be called members of the joint family of Kaliappa

Goundar. Therefore it is very difficult to say that the first defendant got the properties under the partition deed. The Courts below rightly came to the conclusion that she inherited the properties on the death of her husband and, after the passing of the Act, she became the absolute owner of the property. When she becomes the absolute owner of the property, she can deal with it as she likes, and, in this case she has sold away the properties to the second defendant, and the reversioners-plaintiffs cannot question this transaction. Even assuming that the widow and daughter of Kaliappa got the A schedule properties, and the mother, step-mother, sister and sister's son of Kaliappa got the B schedule properties under Exhibit A-1, still the question is, what is the nature of her estate, after the death of her minor daughter, Valliammal. Under Exhibit A-1, she was to get only a life estate and after her lifetime it was to go to Valliammal absolutely. But, unfortunately, Valliammal died unmarried. The first defendant, as the only heir, inherited the properties of her daughter, while she was in possession of the properties as a limited owner. Thus she was holding the properties in a dual capacity, one as a limited estate owner and the other as an heir inheriting the vested remainder of the estate of her daughter. When a person is having the estate in a dual capacity, the larger interests of the properties get merged in her and she becomes the absolute owner of the property. It is unnecessary for her to have executed the surrender deed to herself and then to proclaim that she is the absolute owner. It was only the execution of the surrender deed by her that complicated the matter and thus gave a handle to the reversioners to raise all sorts of complicated questions of law. It is a simple case where a mother inherited the daughter's estate, as heir of her daughter. The Courts below rightly repelled the contention of the reversioners that Valliammal got only a limited estate under Exhibit A-1. It is clear that under the terms of Exhibit A-1, Valliammal got an absolute or an alienable interest in such properties, and the intention of Kaliappa was only to give an absolute estate to her daughter, after the death of his wife, the first defendant. Therefore, I do not agree with the contention of the learned Counsel for the appellants that the widow got the property only by virtue of Exhibit A-1 and therefore she had only an interest as such, and under section 14 (2) of the Hindu Succession Act, she could not dispose of the properties, as she got only a restricted estate. On the other hand, it is clear that Exhibit A-1 cannot be called either a partition deed or a family settlement, but it can only be construed as certain directions to be carried out. She inherited the properties of her husband under Exhibit A-1, and after the passing of the Act, she became the absolute owner. Even assuming that she got the estate under the directions of the deed, she inherited the estate of her daughter which was a vested remainder under the terms of the deed, and she became the absolute owner, after declaration of her intention that she had ceased to be the limited estate owner. Therefore the disputed sale deed executed by the first defendant in favour of the second defendant was rightly held to be valid and binding on the plaintiffs-reversioners. There is also the further finding that the second defendant is a *bona fide* purchaser for valuable consideration. Therefore taking all these into consideration, I am of the opinion that the decision arrived at by the Courts below is correct.

The Second Appeal is, accordingly, dismissed. There will be no order as to costs. No leave.

P.R.N. *Appeal dismissed*; *Leave refused*.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

The Palghat Municipal Council by the Commissioner .. *Petitioner**

v.

The National Motor Works, Ltd., Coimbatore by Managing Director, V. Satagopal .. *Respondent.*

Limitation Act (IX of 1908), section 5—"Sufficient cause"—Appeal wrongly filed in High Court instead of in the District Court due to bona fide *mistake as to forum—Re-presentation in District Court after limitation—Delay—Excuse of—Discretion of Court—Exercise of—Principles—Civil Procedure Code (V of 1908), section 115—Jurisdiction—Failure to exercise—Failure to consider whether there was "sufficient cause" to excuse delay under section 5, Limitation Act—Interference.*

The true guide for a Court in the exercise of its discretion in excusing the delay in presenting an appeal (or application) is whether the appellant or applicant has acted with reasonable diligence in presenting his appeal or application.

When an appeal from an order of the Subordinate Court which should have been presented to the District Court is wrongly presented to the High Court due to a *bona fide* mistake as to the forum for appeal, within the period of limitation prescribed for an appeal to the High Court though beyond the period prescribed for an appeal to the District Court, and it is subsequently presented to the District Court it is a fit case in which the delay in presentation ought to be excused under section 5 of the Limitation Act.

The existence of circumstances mentioned in section 14 of the Limitation Act, would be a "sufficient cause" for excusing the delay under section 5 of the Act.

Where a Court fails to exercise its jurisdiction to see whether there was "sufficient cause" under section 5 of the Limitation Act, for not presenting the appeal in time in the proper Court, the High Court will be justified in interfering with the decision of the lower Court under section 115, Civil Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court of Coimbatore, dated 15th July, 1961, and made in I.A. No. 80 of 1961 in C.E.B. No. 308 of 1961 (E.P. No. 154 of 1959, Sub-Court, Coimbatore in O.S. No. 28 of 1947, Sub-Court, Palghat).

M. Chinnappan Nair, for Petitioner.

M. B. Subbiar for *Row and Reddy*, for Respondent.

The Court made the following

ORDER.—This Civil Revision Petition arises out of an order passed by the District Judge, Coimbatore, in dismissing an application under section 5 of the Limitation Act, for excusing the delay of 259 days in presenting a Civil Miscellaneous Appeal against the order passed by the Sub-Court, Palghat, in E.P. No. 154 of 1959.

The short facts that are necessary for the disposal of this petition are : the petitioner is the decree-holder in O.S. No. 28 of 1947 on the file of Sub-Court, Palghat for about Rs. 13,000. At the instance of the decree holder, the decree was transmitted to the Sub-Court, Coimbatore, for execution. The decree-holder then filed E.P. No. 154 of 1959 on the file of the Sub-Court, Coimbatore, for execution. When an objection was taken by the judgment-debtor, the respondent herein, that the petition was barred by limitation, the petition was dismissed.

The petitioner filed an appeal straight to the High Court, Madras, as he was under the impression that as the amount in the execution petition was more than Rs. 10,000, the appeal lies only in this Court. The Office in the High Court took objection that the appeal does not lie to the High Court but only to the District Court. When the matter was placed before the Court at the instance of the petitioner, an order was passed by Ramachandra Iyer, J. (as he then was) to the effect that the opinion of the Office was correct in saying that the appeal does not lie to this Court, but the Judge observed :

"I cannot say that there was no *bona fide* doubt in the mind of the petitioner in thinking that this Court is the proper Court for entertaining the appeal."

* C.R.P. No. 1099 of 1962. 5th October, 1964.

After the order was passed in the above unnumbered appeal in this High Court and after the receipt of the papers from this Court, the petitioner presented the appeal to the District Court with an application to excuse the delay in presenting the appeal. The learned District Judge dismissed the application agreeing with the contention raised by the judgment-debtor that the petitioner's filing an appeal in the High Court was *mala fide* and it was only a ruse resorted to for the purpose of getting round the normal period of limitation of one month.

It is against this order of dismissal that the petitioner has presented this petition. The contention of the learned Counsel for the petitioner is that the learned District Judge ought to have excused the delay in filing the appeal when the learned Judge in the High Court observed :

> "I cannot say that there was no *bona fide* doubt in the mind of the petitioner in thinking that this Court is the proper Court for entertaining the appeal."

I feel that the District Judge is wrong in coming to the conclusion that the present application is only a ruse to get over the normal period of limitation. The learned Judge should have followed the principle laid down in *Inder Singh* v. *Kamaskiram*[1] where Lord Dunedin observed :

> "We think the true guide for a Court in the exercise of this discretion is whether the appellant has acted with reasonable diligence in prosecuting his appeal."

The learned Counsel cited a decision reported in *Sundara Bai* v. *Belgam*[2], where the facts are almost similar. An appeal from a Subordinate Judge, from its nature, should rightly have been presented to the District Court and not to the High Court. But appellant had acted on mistaken advice in filing an appeal direct to the High Court. The High Court directed the memorandum of appeal to be returned to the appellant for presentation to the District Court. The appellant then filed an application to the District Court, but it was beyond the prescribed period of limitation. Their Lordships of the Privy Council held that the appeal was not barred by limitation and the fact that defendant had acted on mistaken advice as to the law in appealing to the High Court did not preclude them from showing that it was due to their reliance on that advice that they had not presented the appeal to the District Court within the proper period.

In *Parthasarathi Naidu*, In re,[3] by virtue of the amendment of Madras Civil Courts (Amendment) Act of 1956, which substitutes the District Court, instead of the High Court as hitherto, the forum for appeals in cases of suits of specified valuation by necessary intendment lay to the District Court. The appellant in this case filed his appeals to the High Court on the day the Amending Act came into force. An objection was taken by the Office, that the appeals lay only to the District Court. The learned Chief Justice while sitting with Panchapakesa Aiyar, J. in *Parthasarathi Naidu*, In re,[3] observed :

> "Taking up these two appeals one after the other we find that the appeal covered by S.R. No. 12151 of 1957 was filed into this Court even before the expiry of the thirty days which is the period allowed by the Limitation Act for an appeal to the District Court. The papers will be returned to the appellant for presentation to the District Court immediately after the reopening of that Court. There can be no question of limitation as the appeal to this Court was preferred within even the time allowed by law for preferring the appeal to the District Court.
>
> In the other case, however, the appeal would be out of time if it is now presented to the District Court. But having regard to the circumstances of the case and the fact that it was filed in this Court within the ninety days allowed by law, any delay in the circumstances should be excused. The papers will be returned to the appellant to be presented to the District Court."

In another case reported in *S. J. Nathan*, In re,[4] an appeal which ought to have been filed in the Principal City Civil Court, by virtue of an amendment of Madras Act X of 1955, was wrongly filed in the High Court. The learned Judge returned the papers for presentation to the proper Court, with an observation that the appellant can file a petition to excuse the delay in the peculiar circumstances. It is a fit case to excuse the delay.

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1. (1918) L.R. 14 I.A. 218 : 33 M.L.J. 486 : I.L.R. 45 Cal. 94.
2. (1919) L.R. 46 I.A. 15 : I.L.R. 43 Bom. 376.
3. (1957) 2 M.L.J. 200.
4. (1958) 1 M.L.J. 9.

Relying on these decisions I am of opinion, the delay ought to have been excused by the learned District Judge especially when the Judge of this Court while returning the papers made an observation :

"I cannot say that there was no *bona fide* doubt in the mind of the petitioner in thinking that this Court is the proper Court for entertaining the appeal."

But still the contention of the learned Counsel for the respondent is that when the appeal itself was filed in the High Court, it was barred by limitation as it was not filed within 30 days. He is wrong. The appellant had ninety days' time for filing an appeal in the High Court. If he files an appeal in the District Court, it has to be filed within 30 days. Therefore, there is no substance in his contention that as the original Appeal itself when it was filed in the High Court was barred by limitation he could not present this appeal with an application to excuse the delay. He further contended that the High Court should not interfere with the decision of the Lower Court in the exercise of its revisional jurisdiction under section 115, Civil Procedure Code. I do not agree because the learned Judge has not exercised his jurisdiction to see whether there was "sufficient cause" for not presenting the appeal in the District Court.

In *Kayambu Pillai* v. *Court of Wards by Collector, Trichy*[1], the words "sufficient cause" must be literally construed so as to advance snbstantial justice particularly when no negligence nor in action or want of *bona fides* is imputable to the applicant.

In *Krishnan* v. *Chellappa*[2] Justice Abdur Rahman, after referring to *Kayambu Pillai* v. *Court of Wards by Collector, Trichy*[1] held that the equities on which section 14 is based may be taken into account though the section may not in terms be applicable. The existence of circumstances mentioned in section 14, therefore, constitutes a sufficient ground for excusing the delay, under section 5, caused by wrong proceedings.

In the circumstances the Civil Revision Petition is allowed ; no costs.

P.R.N. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

K. R. V. Venkatarama Iyer .. *Petitioner**

v.

Pushpavathi Ammal .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 25—Revisional jurisdiction under—Wider than that conferred under section 115 *of Civil Procedure Code (V of* 1908) *—Propriety of findings of facts can be examined.*

The revisional jurisdiction conferred on the District Judge under section 25 of the Madras Buildings (Lease and Rent Control) Act is wider than that conferred under section 115 of the Civil Procedure Code. Under section 25 of the Madras Buildings (Lease and Rent Control) Act, a District Judge can call for and examine the records relating to any order passed for the purpose of satisfying himself as to the legality, regularity or propriety of such order and that would clearly justify the examination of the propriety or the legality of the findings of facts made by the subordinate authority.

Where a District Judge in the exercise of his revisional authority under section 25 of the Madras Buildings (Lease and Rent Control) Act sets aside the finding of the subordinate authority as to the *bona fide* requirement of the landlord of his premises for his own occupation and he had enough material before him to do so, the matter will not call for any interference in revision under section 115 of the Civil Procedure Code, especially when the District Judge has not exceeded the limits of his jurisdiction in setting aside the finding.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the District Court, Chingleput, dated 13th March, 1964, and made in C.R.P. No. 442 of 1963 presented to revise the order of the Court of the Subordinate Judge of Chingleput in C.M.A. No. 36 of 1962 (R. C. O. P. No. 38 of 1962 Rent Controller, Kancheepuram).

1. (1890) I.L.R. 13 Mad. 269.
2. (1941) 2 M.L.J. 873 : A.I.R. 1942 Mad. 170.

* C. R. P. No. 649 of 1964. 28th October, 1964.

A. Seshan for *T. V. Balakrishnan*, for Petitioner.

K. Parasaran, for Respondent.

The Court made the following

ORDER.—This Revision Petition is preferred by the tenant against an order passed by the District Judge, Chingleput, reversing the order of the Subordinate Judge and restoring the order of eviction passed by the Rent Controller, on a petition filed by the respondent herein that she required the suit premises for her own use and occupation.

The suit premises originally belonged to the respondent's father, Gengadhara Mudaliar. He purchased the house on 10th July, 1958, for the benefit of his daughter. Soon after he purchased the property, he executed a will on 30th July, 1958, bequeathing this property to his daughter. After some years, he conveyed this property by a settlement deed dated 27th January, 1962, to his daughter. Now the daughter filed the present petition before the Rent Controller for eviction on the ground that she required the house for her own use and occupation. The tenant contended that the application was not a *bona fide* one, the reason being that her father originally called upon the tenant to pay enhanced rent of Rs. 60 and Rs. 75 and that when the tenant refused to pay the enhanced rent, the father of the landlady executed a settlement deed in favour of his daughter, with a view to enable her to file an application, as he himself could not file an application, since he possessed a building of his own. The Rent Controller gave a finding that the landlady's application was a *bona fide* one. But on appeal, the learned Subordinate Judge of Chingleput reversed that finding and held that the claim for owner's occupation was not a *bona fide* one. On revision to the District Judge, he agreed with the finding of the Rent Controller and therefore restored the order of eviction passed by the Rent Controller. Now the tenant has filed this Revision Petition.

Learned Counsel for the tenant contends that the District Judge ought not to have interfered with the finding of the learned Subordinate Judge that the respondent's application was not a *bona fide* one. The learned Subordinate Judge, according to him, after considering all the surrounding circumstances attending at the time of the petition, came to the conclusion that the claim of the respondent for her own occupation was not a *bona fide* one.

Now, the question that arises for consideration is, how far a District Judge can interfere in revisional jurisdiction. The relevant provision under the Madras Buildings (Lease and Rent Control) Act, 1960, is section 25. Under that section, a District Judge, may, at any time, call for and examine the records relating to any order passed for the purpose of satisfying himself as to the legality, regularity or propriety of such order. I have also to consider whether the scope of revision under this Act is wider than that in section 115 of the Civil Procedure Code. The Supreme Court had to consider from time to time the scope of revisional jurisdiction arising under the House Rent Control Acts from the various States. In *Moti Ram* v. *Suraj Bhan*[1], the landlord filed an ejection petition on the ground that the tenant was a habitual defaulter and was in arrears of rent. The Rent Controller dismissed the petition, rejecting the pleas of the landlord. On appeal, the District Judge confirmed the finding of the Rent Controller. But on Revision to the High Court, the same was allowed and the claim for evicting the tenant was decreed. The question arose in the Supreme Court whether the High Court had jurisdiction to interfere in Revision with the findings of the Courts below. The revisional jurisdiction conferred under section 15 (5) of the East Punjab Urban Rent Restriction Act is analogous to the revisional jurisdiction conferred on a District Judge under our Act. Their Lordships of the Supreme Court observed :

"The revisional power conferred upon the High Court under section 15 (5) is wider than that conferred by section 115 of the Civil Procedure Code. Under section 15 (5), the High Court has jurisdiction to examine the legality of propriety or the order under revision and that would clearly

1. (1960) S.C.J. 699.

justify the examination of the propriety or the legality of the finding made by the authorities in the present case about the requirement of the landlord under section 13 (3) (*a*) (iii)."

In *Hari Shankar* v. *Girdhari Lal*[1], the landlord filed an eviction petition on the ground that the tenant sublet a portion of the building. The trial Judge decreed the suit. The decision of the trial Judge was confirmed on appeal by the District Judge. A revision was filed to the High Court under section 35 (1) of the Delhi and Ajmer Rent Control Act. That section reads :

"The High Court may, at any time, call for the record of any case......for the purpose of satisfying itself that a decision made therein is according to law."

Their Lordships of the Supreme Court observed at page 701 :

"The power to hear a revision is generally given to a superior Court so that it may satisfy itself that a particular case has been decided according to law. Under section 115 of the Code of Civil Procedure, the High Court's powers are limited to see, whether in a case decided, there has been an assumption of jurisdiction where it did, or there has been material irregularity or illegality in the exercise of that jurisdiction. The right there is confined to jurisdiction and jurisdiction alone. In other Acts, the power is not so limited and the High Court is enabled to call for the record of a case to satisfy itself that the decision therein is according to law.

The phrase 'according to law' refers to the decision as a whole and is not to be equated to error of law or of fact simplicitor."

The Supreme Court had to consider section 35 (1) of the Delhi and Ajmer Rent Control Act in *Pooran Chand* v. *Motilal*[2]. Subba Rao, J., while following the decision in the above case, observed as follows at page 462 :

"It is clear........that the power of the High Court under section 35 of the Act is wider than that under section 115 of the Code of Civil Procedure, though it cannot be equated to that of its jurisdiction in an appeal. It is neither possible nor advisable to define with precision the scope and ambit of section 35 of the Act, but it should be left to the High Court to consider in each case whether the impugned judgment is according to law or not, as explained by this Court in the said decision."

In the above two cases, their Lordships of the Supreme Court had to consider the phrase 'according to law' occurring in section 35 of the Act in question.

In *Karam Singh* v. *Pratan Chand*[3], the landlord filed a suit for ejectment of the tenant on the ground that he sublet the premises without the consent of the landlord. The defence to the petition was that the landlord had acquiesced in the subletting and therefore he was not liable to be evicted. The trial Judge gave a finding that the landlord had not acquiesced in the sub-letting. But on appeal, the Senior Judge found that the landlord continued to receive the rent with the full knowledge of sub-letting. He therefore held that the landlord was not entitled to a decree for possession and set aside the order of eviction. The landlord moved the High Court of Punjab in Revision. When the Rrevision was pending in the High Court, the Delhi Rent Control Act of 1958 came into force. It repealed the Delhi and Ajmer Rent Control Act, 1952. The High Court held that there was no evidence to justify the finding of the learned Subordinate Judge that the landlord had acquiesced in the sub-letting. Accordingly the High Court allowed the petition. Now the tenant filed an appeal to the Supreme Court. The Supreme Court held that the High Court was competent in Revision to set aside the finding of the lower appellate Court on the question of acquiescence.

Bearing these principles in mind and especially what the Supreme Court observed in *Moti Ram* v. *Suraj Bhan*[4], where the Court had to consider section 15 (5) of the East Punjab Urban Rent Restriction Act, a provision analogous to section 25 of Madras Act XVIII of 1960, I have to consider the scope of jurisdiction conferred under section 25 on the District Judges, who have been conferred with similar powers as the High Courts in the various similar Acts referred to herein.

From what has been stated above, it is clear that the revisional jurisdiction conferred on the District Judge under the provisions of the Rent Control Act is wider than that conferred under section 115 of the Civil Procedure Code. Now, under section 25 of the Act, a District Judge can call for and examine the records for the purpose of satisfying himself as to the legality, regularity or propriety of such order.

1. A.I.R. 1963 S.C. 698.
2. A.I.R. 1964 S.C. 461.
3. A.I.R. 1964 S.C. 1305.
4. (1960) S.C.J. 699 : A.I.R. 1960 S.C. 655.

The only question now for consideration is whether the order passed by the District Judge can be sustained on the facts and circumstances of the present case. The Rent Controller found that the application was a *bona fide* one and ordered eviction. On appeal, the learned Subordinate Judge held that the application was not a *bona fide* one, on the surrounding circumstances attending at the time of the petition, namely that the father of the landlady was demanding enhanced rent from time to time and when he was not able to get enhanced rent from the tenant, he executed a settlement deed conveying the suit property in favour of the daughter, so as to enable her to file an application that she required the building for her own occupation. The Subordinate Judge considered various circumstances in regard to the conduct of the father and the daughter in not occupying the building soon after the purchase of the property. But the District Judge reversed the finding of the learned Subordinte Judge, after examining the legality and propriety of that finding. According to the District Judge, when the father purchased the property, it was his intention to give it to his daughter. Accordingly he executed a will bequeathing the property to his daughter. After some years, he executed the settlement deed in favour of his daughter so as to enable her to set up separate residence of her own. Soon after the execution of the settlement deed, the landlady sent notice to the tenant and also requested him to vacate the house. The father also requested the tenant to pay the rent to his daughter. On these facts and circumstances the District Judge found the application of the landlady a *bona fide* one and therefore restored the order of eviction passed by the Rent Controller.

Sitting in Revision, I cannot say that the finding of the District Judge is erroneous. In this connection, it is useful to refer to what Rajamannar, Chief Justice, had laid down to be the circumstances in which a revisional authority would be entitled to interfere with the findings of fact of a subordinate authority. The learned Chief Justice has extracted in *Sasivarna Thevar* v. *Ponnu*[1], what Rajagopala Ayyangar, J., has laid down in C.R.P. No. 1420 of 1954 :

"While an appellate authority is entitled to examine every question of fact and law........a revisional authority cannot normally interfere with findings of fact unless (*a*) there were no other materials on which such a finding could be based ; or (*b*) the finding has been reached by a consideration of irrelevant or inadmissible matter; or (*c*) it is so proverse that no reasonable person could have reached that conclusion ; or (*d*) the finding had been reached by an erroneous understanding of the law applicable to the matter........"

In the instant case, the District Judge had enough material before him, and in exercise of his revisional authority, he set aside the finding of the Subordinate Judge; I do not think that the matter calls for any interference in Revision, under section 115 of the Civil Procedure Code, especially when the District Judge has not exceeded the limits of his jurisdiction in setting aside the finding of fact arrived at by the learned Subordinate Judge.

The Civil Revision Petition is dismissed, but, in the circumstances, there will be no order as to costs.

It is represented to me by the learned Counsel for the petitioner that it is not possible for him to vacate the house immediately as he has got school-going children and in the ordinary course of events the schools will be closed by the end of April, In these circumstances I think it is justifiable to give him some time to enable him to get alternative accommodation and also see that his children are not put to inconvenience. Therefore, I give him time till 30th April, 1965, for vacating the premises and hand over possession.

V.K. *Petition dismissed.*

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1. (1957) 1 M.L.J. 158.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Messrs. Swastik Agency, Madras .. *Appellant**

v.

The Madras Port Trust and another .. *Respondents.*

Madras Port Trust Act (II of 1905), sections 39 (3) and 40 (2)—Applicability and construction—Period of one month' prescribed by section 40 (2)—When commences to run—Owner becoming aware of loss of goods after one month from date of receipt for goods under section 39 (2)—Notice given after that—Suit for damages—If barred—Port Trust Bye-law No. 31—Validity.

Interpretation of Statutes—Meaning of words—Plain and literal meaning—When can be deviated from—Rule—Rule of construction of statute of limitation—Applicability in construction of section 40 (2) of Port Trust Act.

Section 40 (2) of the Madras Port Trust Act should be restricted in its application to cases in which the party has knowledge that the loss or damage has occurred to the goods even on the day when the receipt is given to him under section 39 (3) of the Act. If the knowledge of the loss and the date of the receipt do not synchronise, section 40 (2) would have no application, and the liability of the Port Trust for its carelessness or negligence can be enforced within the period prescribed under the general law of limitation. The result would be that either the period of one month prescribed by section 40 (2) would commence to run from the date when the owner of the goods becomes aware of the loss or damages, or section 40 (2) would not apply at all and the owner would be entitled to file a suit under the general law of limitation governing such matters. It must be therefore be held that section 40 (2) cannot apply to a case where the party becomes aware of the loss for the first time more than one month after the receipt of the goods under section 39 (2) of the Act is passed by the Port Trust. If the goods had been in the custody of the Port Trust Authorities for a period exceeding one month, and the party becomes aware of the loss of the goods only when he takes delivery of the goods, it would work gross injustice if his claim for damages should be held to be not maintainable because he did not give the requisite notice within one month when admittedly he had no knowledge of the loss during that period.

The normal and ordinary rule of construction of any statute is to construe it according to the plain, literal and grammatical meaning of the words, used. But under exceptional circumstances with a view to avoid manifest absurdity, serious hardship and gross injustice, Courts have recognised certain exceptions when the plain, literal and grammatical meaning of the words used would render the statute a nullity, creating a situation of manifest contradiction of the very purposes of the enactment, and in such a case the literal construction can be deviated from.

The principle which applies to the construction of the Articles in the Limitation Act would equally apply to section 40 (2) of the Port Trust Act. Treating that section as prescribing a period of limitation for a claim to be made against the Port Trust, Courts should avoid construing statutes of limitation in such a manner which will have the effect of destroying a valuable right to sue even before the right had effectively arisen or accrued.

Appeal against the decree of the Principal Judge, City Civil Court, Madras, in Appeal Suit No. 38 of 1960, preferred against the decree of the (Fourth Assistant Judge), City Civil Court, Madras, in Original Suit No. 125 of 1958.

G. Ramanujam and *V. Ramaswami*, for Appellant.

V. V. Ragahvan and *J. Nagarajan*, for 1st Respondent.

V. Ratnam (*Amicus Curiae*), for 2nd Respondent.

The Court made the following

ORDER :—Messrs. Swastik Agency, Madras, the appellant in this Second Appeal is the plaintiff in the suit, O.S. No. 125 of 1958 on the file of the City Civil Court, Madras. The appellant imported 80 drums of coconut oil from Singapore, which arrived at Madras Port per *S.S. Rajula* on 9th July, 1957. The shipping documents were entrusted by the appellant to the clearing agent. The consignment was detained in the Port Trust shed by the Customs Authorities for test purposes till 12th August, 1957. On 13th August, 1957, the clearing agent cleared the consignment, and it was noticed that 7 drums out of the said consignment had been tampered with and the oil contained therein had been stolen through holes made in the drums. At

* S. A. No. 1253 of 1961. 13th November, 1964.

the request of the clearing agent a survey of oil from the 7 drums was noticed and those drums were taken delivery on 21st August, 1957. It was found that the total weight of oil lost was 1,494 pounds, the value of which came to Rs. 899.07, calculating the price at Rs. 1,348 per ton. The plaintiff claimed in all, a total sum of Rs. 1,198.54 representing the value of oil lost, customs duty and excise duty, etc. The plaintiff issued a notice to the Port Trust Authorities on 24th August, 1957, claiming damages from the Port Trust.

The first defendant in the suit is the Madras Port Trust and the second defendant is the clearing agent of the plaintiff. The trial Court found that the Port Trust Authorities had not taken sufficient care of the goods in question, that they were guilty of negligence, and that the theft or the pilfering of the oil was due to the carelessness and negligence of the Port Trust Authorities. It also found that the clearing agent had done his duty, and he was not therefore liable for any portion of the plaintiff's claim. In the end a decree was passed against the Port Trust in favour of the plaintiff for a sum of Rs. 1,198.54 with subsequent interest from the date of the decree. The suit against the second defendant was dismissed.

The Port Trust took up the matter in appeal and the appellate Court came to a contrary conclusion for the reasons which shall be dealt with later. The appeal was alllowed and the plaintiff's suit was dismissed. At the same time the appellate Court agreed with the finding of the trial Court that the Port Trust was guilty of negligence in not having taken proper care of the goods while they were in the custody of the Port Trust Authorities. It also accepted the finding of the trial Court that no case of negligence had been made out as against the second defendant. In this connection it may be mentioned that the plaintiff did not prefer any appeal or memorandum of cross objections with regard to the dismissal of the suit by the trial Court as against the second defendant. The plaintiff has preferred this Second Appeal claiming a decree against the Port Trust as well as the clearing agent. Mr. V. Ratnam assisted the Court as *amicus curiae* on behalf of the clearing agent and placed all the relevant decisions.

From the arguments advanced by learned Counsel for the parties the following points arise for determination : (1) Whether the plaintiff's suit is barred under section 40 (2) of the Madras Port Trusts Act on the ground that the notice of loss or damage had not been given to the Port Trust within one month of the date of the receipt of the goods under section 39 (3). (2-*a*) Whether Bye-law No. 31 which provides that the Port Trust will not be answerable for any loss or deficiency unless ascertained, pointed out to and acknowledged by the Traffic Manager before the goods are removed from the Port Trust premises has been complied with in this case. (2-*b*) Whether failure to comply with the requirements of Bye-law No. 31 would operate as a bar to the maintainability of the suit. (2-*c*) Whether the Bye-law is *ultra vires* and in excess of the power conferred under section 95 (4) of the Port Trust Act. (3) Whether a decree can be passed against the second defendant inasmuch as the plaintiff allowed the decision of the trial Court dismissing the suit as against the second defendant to become final and did not prefer any appeal therefrom.

Mr. V. V. Raghavan, learned Counsel for the Port Trust, the first respondent, did not and could not convass the correctness of the concurrent findings of the Courts below that the Port Trust was guilty of negligence and did not take proper care of the drums of oil when the consignment was cleared. The finding arrived at by the Courts below is supported by sufficient evidence and I therefore accept the said finding.

I shall now take up for consideration the several aspects covered by point No. 1. Section 39 of the Port Trust Act (II of 1905), hereinafter referred to as the Act, deals amongst other things with the services to be rendered by the Board (meaning the trustees of the Port of Madras) in relation to receiving, removing, storing or delivering the goods carried by a steamer. Section 39 (3) which is the relevant provision in the instant case runs as follows :—

"The Board, shall, if required, take charge of the goods for the purpose of performing the service and shall give a receipt in the form and to the effect prescribed from time to time by the Central Government.

After any goods have been taken charge of and a receipt given for them under this section, no liability for any loss or damage which may occur to them shall attach to any person to whom a receipt shall have been given or the master or the owner of the vessel from which the goods have been landed or transhipped."

Section 40 runs as follows :

"(1) The responsibilities of the Board for the loss, destruction or deterioration of goods of which it has taken charge shall, subject to the other provisions of this Act and subject also in the case of goods received for carriage by railway to the provisions of the Indian Railway Act, 1890, be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872, omitting the words "in the absence of any special contract" in section 152 of the last mentioned Act. Provided that, till the receipt mentioned in sub-section (3) of section 39 is given by the Board the goods shall be at the risk of the owner.

(2) The Board shall not be in any way responsible for loss of or damage to goods of which it has taken charge, unless notice of such loss or damage shall have been given within one month of the date of the receipt given for the goods under sub-section (3) of the section 39."

In this case the Port Trust took charge of the goods on 9th July, 1957, as evidenced from the tally ship acknowledgment. Calculating one month from that date the notice of the loss or damage should have been given by 9th August, 1957, under section 40(2). But as observed earlier the first notice of loss or damage to the Port Trust was given only on 24th August, 1957. From the facts mentioned above, it will be seen that the goods were in the custody of the Port Trust Authorities till 12th August, 1957, for purposes of scrutiny and verification by the Customs Authorities and at the earliest the plaintiff or its clearing agent got real effective access to the goods only on 13th August, 1957. It is only then, when the goods were taken delivery of, that the pilferage or theft of oil was or could at all be noticed. The plaintiff or its clearing agent had no knowledge, nor could they know or ascertain the loss till the goods were taken delivery of from the Port Trust. It is not the contention of the Port Trust Authorities that the plaintiff had knowledge of the loss or damage to the goods earlier than 13th August, 1957. Obviously the Port Trust Authorities could not advance any such contention as they themselves became aware of the loss only when the claim was made by the plaintiff, with the result that the instant case has to be dealt with on the distinct basis that the plaintiff became aware of and could have known about the loss or damage to the goods only on 13th August, 1957. The question therefore arises whether the failure to issue a notice within the period of one month from 9th July, 1957, that is within 9th August, 1957, as specified in section 40 (2) operates as a bar to the present claim.

Learned Counsel for the Port Trust contended that section 39 (3) and section 40 (1) and (2) should be read together, and that the period of one month and the date of commencement specified in section 40 (2) are absolute and do not admit of any variation or extension. Learned Counsel urged that the obligations, rights and the duties of the Port Trust Authorities are mainly governed by the provisions of the special statute, Madras Port Trusts Act of 1905 and that section 40, while declaring the liability of the Port Trust as that of a bailee under sections 151, 152 and 161 of the Contract has, at the same time, provided the period within which the claim for loss or damage should be made. Learned Counsel urges that the special provision fixing a time limit of one month has been made to avoid delay in the settlement of claim and at the same time provided against Port Trust Authorities being harassed by the belated claims, when by lapse of time evidence would be lost as to how the loss or damage occurred while the goods were in the custody of the Port Trust.

On behalf of the appellant it is contended that section 40 (2) cannot apply to a case like the present one where the party became aware of the loss for the first time more than one month after the receipt of the goods under section 39 (2) of the Act was passed by the Port Trust. He contended that if the goods were in the custody of the Port Trust Authorities for a period exceeding one month and the party becomes aware of the loss of the goods only when he takes delivery of the goods, it would work gross injustice, that his claim for damages should be held to be not maintainable

because he had not given the requisite notice within one month when admittedly he had no knowledge of the loss during that period. It was also urged that in such a situation either section 40 (2) would not apply or the time limit of one month specified in section 40 (2) would commence only from the time when the party aggrieved becomes aware of the loss or damages to the goods. I am free to confess that the question involved is not free from difficulty and on a careful consideration of all aspects of the matter, I am inclined to accept the contention urged by learned Counsel for the appellant.

In arriving at the true interpretation of section 40, it must be borne in mind that after the Board (the Port Trust) passes a receipt under section 39 (3), the master and the owner of the ship are exonerated from any liability whatsoever in respect of any loss or damage which may occur to the goods. The liability or duty of the master or the owner of the vessel whether towards the foreign shipper or towards the consignee at the place of destination comes to an end, and under section 40 (1) the Board is made responsible for the loss, deterioration of the goods or their destruction, as that of a bailee under sections, 151, 152, and 161 of the Contract Act. Section 41 (1) also provides that there cannot be any contract to the contrary in derogation of this liability that is imposed under the provisions of the Contract Act. The proviso to section 40 (1) to the effect that till the receipt mentioned in section 39 (3) is given by the Board the goods shall be at the risk of the owner emphasises that after the receipt is passed the owner gets the protection and the right to hold the Board as his bailee. Stopping there, it is clear that the owner of the goods would be entitled to hold the Board liable for damages consequent upon the carelessness or negligence on the part of the Board to take care of the goods while in its custody as a bailee under the provisions of the Contract Act. It stands to commonsense that the owner cannot be expected to file a suit before he is given access to the goods and also an effective opportunity to examine the goods and he becomes aware of the loss or damage which had occurred to the goods. To hold that the period of the one month specified in section 40 (2) would commence to run even before the owner of the goods became aware of the loss or damage would result in absurd and startling results.

It is true the normal and ordinary rule of construction of any statute is to construe it according to the plain, literal and grammatical meaning of the words used. But under exceptional circumstances with a view to avoid manifest absurdity, serious hardship and gross injustice, Courts have recognised certain exceptions where the plain, literal and grammatical meaning of the words used would render the statute a nullity creating a situation of manifest contradiction of the very purpose of the enactment. The rule as to when the literal construction of a statute can be deviated when the result of such a construction would lead to absurd or startling results opposed to the intention of the Legislature or would completely frustrate the purpose of the statute was stated by Pollock, C.B., in *Waugh* v. *Middleton*[1] thus :

> "however plain the apparent grammatical construction of a sentence may be, if it be properly clear from the contents of the same document that the apparent grammatical construction cannot be the true one, then that which, upon the whole, is the true meaning shall prevail, in spite of the grammatical construction of a particular part of it."

The rule as to modification of the language of a statute is stated thus in Maxwell on Interpretation of Statutes, 11th Edition, at pages 221 and 222 :

> " Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. This may be done by departing from the rules of grammar, by giving an unusual meaning to particular words, by altering their collocation, or by rejecting them altogether, under the influence, no doubt, of an irresistible conviction that the Legislature could not possibly have intended what its words signify and that the modifications thus made are mere corrections of careless language and really give the true meaning. Where the main objects and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. Nevertheless, the Courts are very reluctant to substitute words in a

1. 8 Exche. 352 at 357.

statute, or to add words to it, and it has been said that they will only do so where there is a repugnancy to good sense."

In this connection reference may also be made to the case of *Becke* v. *Smith* [1], where Parke, J., observed thus at page 727 :

"It appears to us, therefore, that the true construction of the clause is, that every voluntary assignment made by one in insolvent circumstances, is void, whenever made with intention to take the benefit of the Act. And this was the clear opinion of the Court of Common pleas in the case of *Wainwright* v. *Miles* [2], though the point was not fully argued. It is true, that upon the plaintiff's view of the case, in order to give full effect to the intention of the Legislature, and to embrace all cases of voluntary transfers, both before and after imprisonment, the language of the clause (not very accurately drawn) must in one respect be understood, not according to its strict sense ; and the words 'within three months before the commencement of the imprisonment', which, strictly construed, exclude the time of imprisonment, must be read so to include it, and taken to mean 'within a period commencing three months before the appointment'; otherwise one of the inconveniences above, pointed out, as necessarily resulting from the defendant's construction, would follow, namely, that a conveyance after imprisonment, though voluntary, would be protected, unless made with a view and intention of petitioning.

To obviate such an incongruity, common to both the constructions according to the strict grammatical sense, the words must be thus slightly varied."

The question as to when a Court can deviate from a literal and mechanical construction of a statute came up for consideration before the Supreme Court in *Harish Chandra* v. *Deputy L.A. Officer* [3], which had to consider the scope of section 18 of the Land Acqusition Act. That section provides that any person interested who has not accepted the award of the Collector may apply to the Collector, requiring the Collector that the matter may be referred for the determination of the Court. Proviso to section 18 dealing with the question of limitation prescribed that every such application to the Collector should be made within six months from the date of the award of the Collector. In that case even though the award was delivered by the Collector on 25th March, 1951, no notice of the award however was givn to the party and it was only on 13th January, 1952, that the party became aware of the award and he filed the application under section 18 on 24th January, 1953. The Allahabad High Court held that the period of six months would commence from the date of the award, regardless as to when the party became aware of the contents thereof. The Supreme Court, reversing that decision, held that a literal and mechanical way of construing the relevant clause was not justified in law, on the ground that the knowledge of the party affected by the award either actual or constructive was an essential requirement of fair play and natural justice and, therefore, the expression " the date of the award" must be constructed as the date when the awarl is either communicated to the party or is known by him either actually or consructively. In taking this view the Supreme Court approved of the principle which was adopted by this Court in *Muthia Chettiar* v. *Commissioner of Income-tax* [4], dealing with section 33-A (2) of the Indian Income-tax Act. There it was held that the time limit of the one year under section 33-A (2) would commence to run not "from the date of the order" but from the date of the receipt of the order by the assessee, on the ground that time should not be computed to run from a date earlier than the one on which the aggrieved party actually knew of the order. That decision contains a reference to other decisions of this Court in which the literal and mechanical construction of a provision of a statute was deviated from on the ground that time should not commence to run against the aggrieved party till he becomes aware of the actual situation and facts entitling him to seek his remedy in a Court of law. The Supreme Court reversed the decision of the Allahabad High Court and applied the principle of the decision of this Court referred to above.

This view was followed in the later judgment of the Supreme Court in *State of Punjab* v. *Qaisar Jeran Begum* [5], reiterating the principle that the period of limitation prescribed for a party to seek redress in a Court of law cannot commence before he

1. 150 Eng. Re. 724 (727).
2. 3 M. & S. 211.
3. (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An.W.R. (S.C.) 10 : (1962) 1 S.C.R. 676 : A.I.R. 1961 S.C. 1500.
4. (1951) 1 M.L.J. 417 : I.L.R. 1951 Mad. 815.
5. (1964) 1 S.C.J. 33 : (1964) 1 M.L.J. (S.C.) 9 : (1964) 1 An.W.R. (S.C.) 9 : A.I.R. 1963 S.C. 1604.

becomes aware of the circumstances entitling him to seek redress. Reference may also be made to the decision of this Court in *Swaminathan* v. *Letchamanan*[1], in which it was held that when the party filed a suit for compulsory registration of the document the period of 30 days "after the making of the order by the Sub-Registrar" refusing registration should be computed not from the date of the order of the Sub-Registrar but when the same is communicated to the party. The argument that the words " making of the order " were plain and unambiguous and did not admit of a construction making the notice of the order essential for the time to commence to run was not accepted. The *ratio decidendi* of this case is also to the effect that limitation cannot commence to run unless the party becomes aware as to how he is affected prejudicially by any act or order of a third party. The acceptance of the contention of the Port Trust would make a harmonious construction of sections 39 (3) and 40 (1) and (2) altogether impossible and frustrate the very purpose for which the liability of the Board was declared as that of a bailee, at the same time denying any right in the Board to enter into a contract to the contrary. The provision for the extinguishment of the liability of the master or the owner of the vessel and the substitution therefor of the liability of the Port Trust would again become meaningless. Take for instance a case in which the Port Trust after becoming aware of the loss of the goods denies access to the owner to remove the goods for more than a month thereby preventing the owner obtaining knowledge of the loss of the goods. To say that in such a situation the owner would be barred under section 40 (2) after the expiry of one month would enable the Board to take advantage of its own wrong, and escape its statutory liability as a bailee. In this connection reference may be made to the statement of the law in Maxwell, page 202, where the learned author deals with cases in which Courts have deviated from the plain grammatical meaning of the words used in a statute for the purpose of avoiding injustice and impolicy of enabling a man to defeat or escape from his obligation by reason of wrongful act or otherwise profit by his own wrong.

The matter can also be considered from another aspect, treating section 40 (2) as prescribing a period of limitation for a claim to be made against the Port Trust. The principle which applies to the construction of the several articles in the Limitation Act would equally apply to section 40 (2) of the Port Trust Act. It is settled law that in construing the language of the third column of the several articles in the Limitation Act they should be so interpreted as to carry out the true intention of the Legislature by dating the cause of action from a date when the remedy is available to the party, he having become aware of the circumstances under which the right had accrued to him. Undue emphasis should not be laid either on the first column or the third column. If in a given case the facts fit in with the first column of a particular article but the third column is under the circumstances inapplicable that article should be altogether rejected. Equally if the first column is inapplicable, the case should be taken out of the operation of that article. In other words for a particular article to govern, its first and third columns should be clearly applicable to the case. Vide *Seetikutti* v. *Kunhi Pathumma*[2], and *Muthu Korakkai Chetty* v. *Madar Ammal*[3]. In this connection reference may also be made to the decision of the Bombay High Court in *Ganapat* v. *Honam Gouda*[4], in which while the possession of the property was outstanding with a prior mortgagee the mortgagor executed a second mortgage in 1908. The mortgagor obtained possession of the property from the first mortgagee only in 1917 and the second mortgagee filed the suit in 1924 to recover possession of the property from the mortagagor. On behalf of the mortgagor it was contended that under Article 135 the period of twelve years prescribed for the mortgagee to recover possession of the property would commence to run from the date of the mortgage, *i.e.*, 1908. This argument was not accepted by the Bench of the Bombay High Court. Beaumont, C.J., delivering the judgment of the Bench held that in construing Acts of limitation Courts must always remember that the

1. (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491.
2. (1917) I.L.R. 40 Mad. 1040 at 1062 : 33 M.L.J. 320 (F.B.).
3. (1919) 38 M.L.J. 1 : I.L.R. 43 Mad. 185 at 213 (F.B.).
4. A.I.R. 1933 Bom. 439.

object of the Legislature is to induce people to be active in the assertion of their rights and to penalise those who sleep upon those rights; and that Courts should avoid construing statutes of limitation in such a manner which will have the effect of destroying a valuable right to sue even before the right had effectively arisen or accrued. Adopting this principle, section 40 (2) should be restricted to cases in which the party has knowledge of the loss which has occurred to the goods even on the day when the receipt was given under section 39 (3). If the knowledge of the loss of the goods and the date of the receipt do not synchronise, section 40 (2) would have no application, with the result that the liability of the Port Trust for its carelessness or negligence as bailee could be enforced within the period precribed under the general law of limitation. The result therefore is that either the period of one month should commence to run from the date when the owner of the goods becomes aware of the loss or damage or section 40 (2) would not apply at all and the owner will be entitled to file a suit under the general law of limitation governing such suits.

Learned Counsel for the respondent in the course of his argument relied upon certain observations of the Supreme Court in its recent judgment in Civil Appeal Nos. 187 to 191 of 1962. That case dealt with the question as to whether the steamer agents at the Port of Madras are liable to pay certain charges described as the charges claimed by the Port Trust representing payment of idle allowanc. insisted upon to expedite the discharge of the cargo at the quay. The argumen on behalf of the steamer agents was that once the receipt is passed by the Por Trust under section 39 (3) of the Act, the Port Trust becomes a bailee of the consignee and that the charges should therefore be recovered only from the consignee and that all the services rendered by the Port Trust were all rendered only for and on behalf of the consignee. The Supreme Court did not accept this contention but held that the services rendered by the Port Trust were services rendered on behalf of the steamer agents. The observations contained in the judgment regarding the liability of the Port Trust should be understood in that context. I do not read those observations as holding that the consignee or the owner of the goods would not be entitled to hold the Port Trust liable for damages or loss caused to the goods on account of the negligence or carelessness on the part of the Port Trust while the goods were in their custody. The reference by the Supreme Court to the Bench judgment of this Court in *Great Eastern Shipping Co., Ltd.* v. *Govindasamy*[1] shows that the decision of the Supreme Court cannot be interpreted in the manner contended for by the learned Counsel for the Port Trust.

I shall then take up for consideration the points relating to Bye-law 31. It is unnecessary to consider the question as to how far Bye-law 31 is in conformity with the power conferred upon the Board to frame Bye-laws under section 95 of the Act. The evidence discloses that arrangements were made for the survey of the goods immediately after the Customs Authorities released the goods and the Shed Master of the Port Trust has himself admitted that he was aware of the survey. The survey was held by an impartial and respectable Surveyor and it was not suggested that there was anything wrong or *mala-fide* in the survey. I am of opinion that on the facts of the instant case there has been substantial compliance with Bye-law 31, and the loss or damage of the goods had been brought to the notice of the Port Trust Authorities immediately before the removal of the goods from the Harbour premises.

The result, therefore, is that the judgment of the lower appellate Court is set aside and that of the trial Court is restored. The plaintiff's suit is decreed for Rs. 1,198-64 nP. against the first defendant with costs in this Court and the Court below and subsequent interest from the date of the decree. In this view, the suit is dismissed as against the second defendant but without costs. I am not expressing any opinion about the arguments advanced regarding the liability of the second defendant. No leave.

P.R.N. ——— *Appeal allowed.*

1. (1957) 2 M.L.J. 98 : I.L.R. (1957) Mad. 850.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

Burmah Shell Oil Storage and Distributing Company of India, Ltd. .. *Appellant* *

v.

The State of Madras represented by the Commissioner of Commercial Taxes, Board of Revenue, Madras and another .. *Respondents.*

Madras Sales of Motor Spirit Taxation Act (*VI of* 1935), *sections* 2 (*f*) *and* (*g*) *and* 3—*Construction and scope*—'*Sale*'—*Sale of Goods Act* (*III of* 1930), *section* 4—*Applicability to sale under Madras Act VI of* 1939—*Taxation of sales*—*Place of passing of property or place of consumption*—*Relevant point*—*Constitution of India* (1950), *Article* 286 (2)—*Applicability.*

The appellant, carrying on business of selling petrol and petrol products wholesale and retail has depots at Ernakulam in Kerala State and supplied petrol and petrol products to purchasers in the State of Madras, deliveries in many instances being effected from and out of the stock stored in the depots at Ernakulam. In fulfilment of contracts of sale entered into by the appellant with the purchasers supplies and deliveries were made from the storage point of Ernakulam, and after the deliveries were made the goods were transported to Madras by the railway. The purchasers took the railway receipts in their own names, cleared the goods and obtained delivery from the railway at Madras. The State of Madras assessed these sales to tax but the appellant contended that the sales were not liable to tax in Madras.

Held, (1) There being no definition of 'sale' in the Madras Sales of Motor Spirit Taxation Act, 1939, which is a special enactment, the definition of 'Sale' in the Sale of Goods Act must govern the case; the popular concept of sale has no place in a taxing statute and a tax cannot be levied except in accordance with the law.

(2) Under the Sale of Goods Act, it is the passing of property that makes a sale and the incident of sale having taken place at Ernakulam, outside Madras State, the latter would not be entitled to levy tax on the sales in question.

(3) The fact that the purchasers, subsequent to the completion of the sales at Ernakulam, brought the goods to the State of Madras for consumption, will not confer any power on the State of Madras to tax the sale transaction as no provision of the Act justifies the levy of a tax on the situs of consumption. The import of the definition of 'retail dealer' and 'retail sale' in section 2 (*f*) and (*g*) of the Sales of Motor Spirit Taxation Act is that only those sales which are for the purposes of consumption can be brought to tax, and as the taxable incident, *i.e.*, the sale and passing of property, having begun and ended at Ernakulam no other incident which might have taken place at Madras would be relevant.

There was no inter-State element in the transactions so as to attract the application of Article 286 (2) of the Constitution of India.

Appeal under Clause 15 of the Letters Patent, against the Order of the Honourable Mr. Justice Jagadisan, dated 30th August, 1962, and made in the exercise of the Special Original Jurisdiction of the High Court, in Writ Petition No. 1105 of 1960, presented under Article 226 of the Constitution of India, to issue a Writ of *certiorari* calling for the records relating to the assessment of tax made by the Commercial Tax Officer, North Madras, on 31st March, 1957, and the order passed by the Board of Revenue by its proceedings, P. B. Mis. 68/60, dated 3rd May, 1960, confirming the orders of the Subordinate authorities and quash the said orders and made therein.

V. Tyagarajan instructed by *M/s. King and Partridge*, for Appellant.

The Additional Government Pleader for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The appellant is the Burmah Shell Oil Storage and Distributing Company of India, Limted. It carries on business by selling petrol and petroleum products, wholesale and retail. It has depots at Ernakulam in the Kerala State and it supplies petrol and petroleum products to purchasers in the Madras State and, in many instances, the deliveries are effected from and out of stock held by

* Writ Appeal No. 118 of 1963. 14th December, 1964.

it at Ernakulam. It is from this storage point that supplies and deliveries are made in fulfilment of the contracts of sale entered into by the appellant with the purchasers inside the Madras State. It is not in dispute that after the deliveries were affected to such purchasers at Ernakulam, the goods are transported from Ernakulam to the Madras State by the Railway. The purchasers take the railway receipts in their own names, clear the goods and obtain delivery from the common carrier at Madras. Such sales, during the years 1953-54 to 1955-56 upto 5th September, 1955, were not included in the return submitted by the appellant for taxation under the Madras Sales of Motor Spirit Taxation Act, 1939. The appellant contended that these sales were not taxable but the Commercial Tax Officer assessed the sales to tax. An appeal was preferred against the imposition of the tax but that failed. The further revision to the Board of Revenue was also dismissed. Thereafter, the appellant filed the Writ Petition in this Court challenging the levy of the tax.

Jagadisan, J., who heard the writ petition, accepted the following as the course of the transactions as found by the Board of Revenue and conceded to be correct by both sides :—

> "Now the transactions of the Revision petitioner took place in the years 1953 to 1955 (upto 5th September, 1955) ; the firm had its head office at Madras ; its accounts were made at Madras ; the buyers were in Madras ; they entered into contracts of sale within this State ; they made payments at Madras ; the goods were delivered to the buyers within this State for consumption in this State, though the property in the goods, passed to the buyers at places outside this State."

The contention of the appellant before the learned Judge was that there was no sale inside the State of Madras, as the property in the goods passed outside the State and that the transaction was really inter-State and fell within the prohibition of Article 286 (2) of the Constitution as it then stood. The learned Judge, however, thought that though the expression " sale" was not defined in the relevant enactment, one has necessarily to apply the definition occurring in the Sale of Goods Act and held that of the several elements which go to make up a sale, such as (1) the contract of sale, (2) the payment of the price, (3) delivery of the subject-matter of the sale and (4) passing of property, the State has jurisdiction to tax a sale, if some one of the incidents of the sale had taken place inside the State . He observed:

> "It seems to me that though it is essential that there must have occurred a sale before it is exigible to tax under the Act, it is immaterial to ascertain whether the passing of the property under that sale was inside or outside the State."

He also thought that " the major activities of the sale had undoubtedly occurred within the taxing State". He rested his conclusion upon the popular concept of sale indicated in the decision of this Court in *Poppatlal Shah* v. *State of Madras*[1]. Though he was aware that this decision had been reversed by the Supreme Court in *Poppatlal Shah* v. *The State of Madras*[2] the learned Judge thought that the view taken by the Supreme Court was rested on the *Explanation* to section 2 (*h*) of the Madras General Sales Tax Act and that, but for that *Explanation*, the observations of the Supreme Court did not express any dissent from those of Venkatarama Ayyar, J. in the decision of the Madras High Court referred to. The learned Judge in fact expressed himself thus :

> "On the other hand, it seems to me that the Supreme Court gave its *imprimatur* to those observations."

After dealing with the arguments centering round Article 286 (2) of the Constitution, he expressed no final opinion on the question whether the transactions were of inter-State character. In effect, he held that notwithstanding the property in the goods passed outside the State, the State could bring those transactions to tax and dismissed the Writ Petition. Hence this appeal.

At the outset, we may emphasise that the sales in the present case have been brought to tax not under the Madras General Sales Tax Act but under a special enactment, the Madras Sales of Motor Spirit Taxation Act, 1939. This was intended to provide for the levy of tax on retail sales of motor spirit in the Province of

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1. (1952) 2 M.L.J. 593.
2. (1953) S.C.J. 369 : (1953) M.L.J. 739 : (1953) S.C.R. 677.

Madras. Retail sale is defined herein as a sale of motor spirit by a retail dealer for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased and a retail dealer is defined as any person who sells or keeps for sale motor spirit for the purpose of consumption by the person by whom or on whose behalf it is or may be purchased. Apart from these two expressions, there is no definition of a " sale " and it is not disputed by the learned Additional Government Pleader, who appears for the State of Madras, the respondent, that, in such a case, we have to be guided by the definition of sale, as found in the Indian Sale of Goods Act. What is however argued on behalf of the respondent is that since the retail sale is defined as a sale for the purpose of consumption and since that consumption took place in the Madras State, the goods having been brought into the State after purchase at Ernakulam, the sale is in fact located in the State of Madras and the tax is accordingly exigible on those transactions. Now the charging section in section 3 (1) which provides for the levy of a tax " on all retail sales of motor spirit effected after the commencement of this Act,....and such tax shall be payable by the person effecting the sale". Thus the definition of " retail sale " which means a sale by a retail dealer for the purpose of consumption by the purchaser leads us to the position that the place of consumption becomes important in the context of the levy of tax. That in short is the term of argument of the Department.

Mr. V. Tyagarajan, learned Counsel for the appellant points out that the reliance on *Poppatlal Shah* v. *State of Madras*[1] as rendered by this Court is wholly erroneous and that in fact the Supreme Court has laid it down in unambiguous terms that the levy of a tax cannot be justified on any popular notions of a sale. According to learned Counsel, the admitted position here is that the sales were effected at Ernakulam outside the State and that the purchaser having taken delivery of the goods in consequence of a completed sale transaction outside the State, the fact that he has subsequently brought the goods into the State of Madras will not confer any power on the State of Madras to tax the sale transaction ; what is taxable under the Act is the retail sale for the purpose of consumption. That these sales are of that character is not denied. No provision of the Act justifies the levy of a tax on the situs of the consumption. The real import of the definition of retail dealer and retail sale in the Act is only to bring only a particular category of sales to tax, that is to say, only those sales which are for the purpose of consumption by the purchaser can be brought to tax. It is the sale that is taxed and if the passing of property took place at Ernakulam, the taxable incident began and ended there and it was not any other incident of sale which the relevant enactment purported to fix as the taxable point.

It seems to us that these contentions are sound. It is unnecessary to cite any particular passage from the judgment of the Supreme Court. It would suffice to observe that in so far as the expression " sale " is not defined in any particular manner by the Madras Sales of Motor Spirit Taxation Act, the expression " sale " has to be construed only in the light of the Indian Sale of Goods Act or the legal connotation of that expression as understood. The popular concept has no place in a taxing enactment. It is common place that a tax cannot be levied except in accordance with the law and that fundamental principle should suffice to dispose of the contention that the popular concept of a sale can be relied upon to levy a tax.

Under the Sale of Goods Act it is beyond dispute that it is the passing of property that marks a sale and it does not also, appear to be in dispute that that incident of the sale took place at Ernakulam.

Learned Additional Government Pleader sought to claim that since the goods were transported to the State of Madras, the delivery in pursuance of the sale must be deemed to have taken place in the State of Madras and that event could justify the imposition of the tax. As we have pointed out, the enactment does

1 (1952) 2 M.L.J. 593.

not fix this incident of a sale transaction as a taxable event. In the light of the definition as it stands, it is only the passing of property that can form the taxable event. Even otherwise, it is clear from the facts, as admitted by both sides, that there was an effective delivery to the purchaser at Ernakulam and thereafter the goods were transported to Madras as the property of the purchaser. That he took delivery of the goods from the common carrier at Madras does not make that delivery a component part of the sale transaction.

It seems to us unnecessary to examine the incident in the light of Article 286 (2) of the Constitution. On the facts, as found and admitted, there was no inter-State element at all. The sale was completed at Ernakulam and the subsequent transmission of the goods, is, as we have pointed out, not a part of the sale transaction.

The Department seems to have been confused between the exigibility to tax of a sale transaction under the Madras General Sales Tax Act and of one under the Madras Sales of Motor Spirit Taxation Act. In the former Act, the expression " sale " has been defined very differently and in a more comprehensive manner than what appears in the latter Act, and it is this feature that has induced the Department to overlook the differences in the principles of taxation under the two enactments.

It follows that the appeal has to be allowed ; the judgment of the learned Judge has to be set aside. The appellant will be entitled to his costs, Counsel's fees Rs. 150.

P.R.N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

Velayudam Thankayyan and another .. *Appellants* *

v.

Rev. G. W. T. Trowell and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *sections* 100 *and* 103—*Finding of fact—Interference—Powers of High Court—First Appellate Court not dissenting from finding of trial Court but reversing decree without reference to that finding—High Court going into evidence and determining issue of fact on sufficient evidence available on record—If justified.*

Practice—Procedure—Right of appeal—If vested right—No Letters Patent Appeal available at time of commencement of lis—*Subsequent enactment merging area in State with High Court governed by Letters Patent—Right of Letters Patent Appeal—States Reorganisation Act* (*XXXVII of* 1956), *section* 119—*Scope and effect of.*

The High Court has no jurisdiction in Second Appeal to interfere with what is virtually a question of fact, even if that finding be erroneous. The only jurisdiction which the High Court would have in case it is inclined to view the disposal of the appeal by the Lower Court as inadequate or imperfect, is to set aside the decree and to remit the appeal for further hearing and disposal. But when there are explicit findings of fact by the trial Court on the real points arising in the case which have not been dissented from by the superior Court, if the first appellate Court has reversed the decision of the trial Court without referring to the relevant findings based on sufficient evidence, the High Court under section 103, Civil Procedure Code, may certainly determine the issue of fact necessary for the disposal of the appeal, and the High Court in Second Appeal would be justified in restoring and affirming the decree of the trial Court, reversing the decree of the first appellate Court. The rights which would accrue to a plaintiff would be the rights governing the *lis* at its commencement, and such rights would be available to both parties for the entire career of litigation, regarded as an intrinsic unity, unaffected by any enactment which supervenes. But this principle is subject to the specific exception that any such right might conceivably be affected either by a retrospective provision in the statute itself, or by any law which has that consequence, by necessary intendment.

At the time when the litigation or *lis* started in the trial Court the highest Court of competent jurisdiction was the Travancore-Cochin High Court (second appellate Court) and a Second Appeal lay to that Court from the decree of the first appellate Court. Subsequent to the disposal of the first appeal, the area in question (Kanyakumari) was merged in the Madras State by virtue of the States

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* L.P. Appeal Nos. 12 and 13 of 1963. 30th December, 1964.

Reorganisation Act of 1956. Section 19 of that Act contained a saving provision with regard to any law in force in the merged territories, immediately before the appointed day.

The Second Appeal was presented to the Madras High Court, which became the second appellate Court after the merger and it was disposed of by a single Judge of the Madras High Court. The defendant who failed in the Second Appeal preferred a Letters Patent Appeal against the decision of the single Judge. The respondent (plaintiff) raised a preliminary objection on the ground that as the Travancore-Cochin High Court was not governed by any Letters Patent and as the procedure attaching to the right of appeal would have to be that in vogue in the Travancore-Cochin High Court, there was only a single right of Second Appeal to the High Court and there was no further appeal from the judgment and decree in Second Appeal to any Division Bench under the Letters Patent.

Held, There is an essential distinction between a substantive right of appeal and the procedure prescribed for disposing of that appeal. Whether the appeal was disposed of by a single Judge or by a Bench of two Judges, it was a disposal of the High Court itself. The internal distribution and allocation of work between and among the Judges of the High Court is a matter of procedure, not affecting the vested right of a party.

The necessary intendment of the States Reorganisation Act is that the Madras High Court should have jurisdiction to dispose of the Second Appeal which would have been filed in the Travancore-Cochin High Court but for the merger. There being no question of any vested right of appeal being taken away, but on the contrary the right being affirmed though in the new High Court which has competent jurisdiction, the appeal would be governed by the rules relating to appeals; and since those rules provide for a disposal of the oppeal by a single Judge and a further appeal to a Division Bench of the same High Court, as a question of internal procedure of the High Court, no vested right of appeal is thereby taken away. Nor can it be said that the finality of any decision is affected, the Letters Patent Appeal being only an extension of the same process of the disposal of the Second Appeal by a single Judge of the High Court of Madras.

The Letters Patent Appeal is consequently competent.

Appeals under clause 15 of the Letters Patent against the Judgment and Decree of the Honourable Mr. Justice Ramakrishnan, dated 9th March, 1962 and passed in S.A. Nos. 62 and 63 of 1961 preferred against the Decrees of the District Court of Kanyakumari at Nagercoil in A.S. Nos. 11 and 12 of 1960 preferred against the Decree of the Court of the District Munsif of Kuzhithurai (Principal) in O.S. Nos. 183 of 1952 and 121 of 1950 respectively.

K. S. Sankara Ayyar and *A. Subramania Ayyar*, for Appellants.

N. D. Joss, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—These appeals are intimately related to each other, and spring from the subject-matter of the same controversy and the same litigation. Hence, we are disposing of them by means of a common judgment. But it will be most convenient to deal first with L.P.A. No. 13 of 1963, which alone can be said to present any problems in adjudication. L.P.A. No 12 of 1963, as we shall presently show when dealing with it, is of a very restricted scope, and can be effectively disposed of in a few lines.

As far as L.P.A. No. 13 of 1963 is concerned, the Second Appeal from which it now arises, was instituted before Ramakrishnan, J., by the seven plaintiffs, the respondent being James Arthur Edwards (defendant 1). It is essential to turn to the facts of the litigation from which this Second Appeal ultimately emerged, which was O.S. No. 121 of 1950 before the Learned District Munsif of Kuzhithurai. The nine plaintiffs who brought forward that action, of whom the first plaintiff was the Attorney of the L.M.S. Corporation of the London Missionary Society, advanced the case that, in 1946, the Travancore Church Council accepted a scheme of union, which resulted in the formation of the Church of South India. The validity of that Union, in the context of the congregational practices of the constituent churches of the Travancore Church Council, and the tenets of the newly-formed Church of South India, has been the subject-matter of controversy in this litigation, and in related litigations, disposed of by common judgments, at very considerable length; but, for the restricted purpose of this appeal, it is quite unnecessary to proceed into this controversy, which may be not improperly termed as partaking of several characteristics of a theological dispute, although not without its legal aspects also.

The action that now concerns us related to the Church of Marthandam, and was preceded by certain proceedings under section 143 of the Travancore-Cochin Criminal Procedure Code, in the Court of the local First Class Magistrate. There was a magisterial enquiry, and then, a revision to the High Court. The ultimate result was that the church property, which is the main subject of dispute, was kept under a pending attachment, and the parties were referred to a Civil Court with regard to the right to possession. The plaintiffs claimed that the first defendant (James Arthur Edwards, here appellant), had absolutely no right to possession of the Church property, that he was never in such possession, and that he should now be directed to surrender possession, and not to disturb or interfere with the possession of the plaintiffs and their conduct of the rituals and ceremonies of the Church, in accordance with the Church Union, in the Church at Marthandam. The first defendant (appellant) put forward pleas, *inter alia*, that the L.M.S. Corporation was merely a Trustee for the L.M.S. Church, that the true beneficiaries, as far as the Marthandam Church was concerned, were the members of the London Mission Congregation in the Township, that the first defendant was the elected Secretary of the Church Committee, and that the Travancore Church Council was incompetent to liquidate the Congregation, so to speak, and to bring about the Union that we have earlier referred to, thereby acquiescing in practices and tenets that are alien to the congregational worship. The suit was hence liable to be dismissed with costs.

We find that six issues were framed in the trial Court, and that additional issues, Nos. 7 to 15, were subsequently framed. Nevertheless, there is no single issue that can be said to specifically focus the controversy upon the aspect that seems to us to be adequate to dispose of this appeal. For instance, arguments have been addressed before us with regard to the status of the appellant, James Arthur Edwards, either as Secretary of the Church Committee, or as representing the Church Committee. There is no issue on that point. The Church Committee is not a party to the suit, and, as we understand the case of the plaintiffs, they deny that this defendant can legitimately term himself the Secretary of any such Committee, or can represent the Committee, or even that there is any such Committee at all in existence. There is no plea that the suit is bad for non-joinder of the Church Committee ; at any rate, there is certainly no specific issue on that point. It is indisputable that, whatever the result of the present suit might be, it would not be *res judicata* as against bodies not brought into the array of parties in this suit, and strangers to it. The other aspect that seems to us to be vital is the factum of the possession of Church property on the date of suit. Upon that, there is no specific issue, though there is an issue of that kind with regard to the Magisterial Enquiry. Additional Issue No. 7 is merely to the effect whether the plaintiffs have any right and possession over the plaint-property, and Additional Issues Nos. 14 and 15 relate to the right of the plaintiffs to compel the defendants to surrender possession, and to the ownership of the L.M.S. Corporation.

This, briefly outlined, is the background of the litigation. The subsequent facts are not in dispute. The suit was decreed in terms of the plaint by the Principal District Munsif, and the 1st defendant appealed to the learned District Judge of Kanyakumari at Nagercoil. The learned District Judge disposed of this appeal by means of a judgment in A.S. No. 12 of 1960. That is a very brief judgment, in which a great deal of the area of controversy is excluded from consideration, for the simple reason that the learned Judge dealt with it elaborately in the related judgments in A.S. Nos. 144 and 150 of 1959 before him ; the judgments in those appeals were directed by him to be appended to the judgment here. Ramakrishnan, J., again, disposed of this Second Appeal along with the other appeals, by means of a very elaborate judgment in which the validity of the Union that we earlier referred to, has been the subject of discussion. Ultimately, the learned Judge, for reasons stated by him, reversed the judgment of the first appellate Court and restored the judgment and decree of the trial Court, as far as the present action is concerned. Hence, the first defendant has instituted this Letters Patent Appeal.

There is a ground of a preliminary nature raised by learned Counsel for the respondents with regard to the maintainability of this appeal. It is a point of some interest, and we might deal with it before disposing of the appeal itself. It can be tersely stated in the following form. At the time when this litigation or *lis* commenced, the highest Court of competent jurisdiction was the Travancore-Cochin High Court, and an appeal lay to that Court under the law governing the territory, from the judgment and decree of the learned District Judge in first appeal. Subsequently, these areas of Kanyakumari were merged in Madras State by virtue of the States Reorganization Act (XXXVII of 1956). Under section 119 of that Act, there was a saving provision with regard to any law in force in the merged territories, immediately before the appointed day. If the effect of this is to invest the parties to this action with the rights which had accrued to them prior to the date of merger, it is contended for the plaintiffs that not merely would they have a right of Second Appeal to the High Court, but also that the procedure attaching to that right would have to be the procedure which was in vogue in the Travancore-Cochin High Court. The Travancore-Cochin High Court was not governed by any Letters Patent, similar to the Letters Patent that governs the organisation and procedure of the Madras High Court. There was only a single right of appeal to the High Court, and there was no further appeal from the judgment and decree in the Second Appeal to any Division Bench.

Reliance is placed on the decision of the Supreme Court in *Garikapati* v. *Subbiah Choudhry*[1] for the proposition that a right of appeal is a substantive or vested right, and that, if it was available to a party at the time when the *lis* commenced, it would not be affected by any subsequent change in the law, which had the effect of taking away the right. Reliance is also placed on the decision of a single Judge of Rajasthan High Court in *Jas Karan* v. *Bhanwarlal*[2] for the same proposition. Further, that case purports to follow the dicta in *Garikapati* v. *Subbiah Choudhry*[1]. The legal pursuit of a remedy and the appeal and Second Appeal are connected by an intrinsic unity, and must be regarded as one legal proceeding. The very institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties, till the rest of the career of the suit. The argument is that, equally, any right flowing from the finality of the decision at a particular stage, must be preserved to the party to whom it accrues. Under the law as it stood at the time of the commencement of the litigation, if the plaintiffs succeeded in the appeal before the High Court, they were entitled to the preservation of the finality of that right, without any challenge to the decree by way of a further appeal to a Division Bench of the same High Court. On this logic, it is contended the present Letters Patent Appeal to us will be incompetent.

A very similar situation arose in Andhra Pradesh and was dealt with by a Division Bench of that Court in In re *Sridhar Rao*[3]. That also related to litigation from certain territory in Telangana, originally governed by the procedures of the defunct Hyderabad High Court. The proceeding was statutorily transferred to the Andhra Pradesh High Court, and an argument of a very similar character was sought to be raised that there could be no Letters Patent Appeal against the judgment of a single Judge of the High Court of Andhra Pradesh, disposing of a Second Appeal arising out of that area. Subba Rao, C.J., (as he then was), referred to the Full Bench decision of this Court in In re *Vasudeva Samiar*[4] and also to *Garikapati* v. *Subbiah Choudhry*[1]. The learned Chief Justice then pointed out that there was an essential distinction between a substantive right of appeal, and the procedure prescribed for disposing of that appeal. Whether the appeal was disposed of by a single Judge or by a Bench of two Judges, it was a disposal of the High Court itself. The internal distribution and allocation of work between and among the Judges of the High Court was a matter of procedure, not affecting the vested right of a party.

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1. (1957) S.C.J. 439 : (1957) 2 M.L.J. (S.C.) 1 : (1957) 2 An.W.R. (S.C.) 1 : A.I.R. 1957 S.C. 540.
2. A.I.R. 1959 Raj. 45.
3. (1957) 2 An. W.R. 319 : I.L.R. (1957) A.P. 660 : A.I.R. 1958 A.P. 60.
4. 56 M.L.J. 369 : I.L.R. 52 Mad. 361 (F.B.).

We are of the view that the preliminary objection can be clearly disposed of within the ratio of *Garikapati Veerayya's case*[1] alone, without any further complication or difficulty. We certainly agree that, even apart from section 119, to which reference has been made, upon well-settled principles of law, the rights which would accrue to the plaintiffs would be the rights govering the *lis* at its commencement, and that such rights would be available to both parties for the entire career of the litigation, regarded as an intrinsic unity, unaffected by any enactment which supervenes. But that is subject to the specific exception that any such right might conceivably be affected either by a retrospective provision in the statute itself, or by any law which has that consequence, by necessary intendment. This principle has been recognised in *Craies on Statute Law*, 6th Edition, page 396, following the observations of Evershed, M. R. in *Hutchinson* v. *Jauncey*[2]. The principle has been put in the form that "if the necessary intendment of the Act is to affect pending causes of action, then, the Court will give effect to the intention of the Legislature, even though there is no express reference to pending actions." Certainly, the necessary intendment of the States Reorganization Act is that the Madras High Court should have jurisdiction to dispose of that Second Appeal, which would have been filed in the Travancore-Cochin High Court, but for the merger. It has to be noted that, here, there is no question of a vested right of appeal being taken away; on the contrary, the right is affirmed, but, in the new High Court which has competent jurisdiction. Such an appeal, as pointed out in the Andhra Pradesh decision cited, will be governed by the rules relating to appeals, which are a matter of internal organisation of the High Court, by Letters Patent. Those rules provide for a disposal of the appeal by a single Judge, and a further appeal therefrom to a Division Bench of the same High Court, as a question of internal procedure of the High Court. No vested right of appeal is thereby taken away; nor can it be said that the finality of any decision is affected, for the Letters Patent Appeal is an extension of the same process of the disposal of the Second Appeal by a single Judge of the High Court of Madras. We are hence of the view that this preliminary objection has no force.

Proceeding now to the merits, the main argument of learned Counsel for the appellant, Sri K. S. Sankara Ayyar, is the simple one that this Court, in Second Appeal, would have no jurisdiction to interfere with a finding of fact, even if that finding be erroneous. Hence, the learned Judge (Ramakrishnan, J.) erred in disposing of the Second Appeal, by reversing the decree of the first appellate Court and restoring the decree of the trial Court, when the first appellate Court has found, as a question of fact, that the plaintiffs were not entitled to possession of the Marthandam Church. There are several authorities of the Supreme Court, which need not be cited here, since the proposition is not in dispute, laying it down in unambiguous terms, that this Court would have no jurisdiction to interfere in Second Appeal upon what is virtually a question of fact, even if the finding be erroneous. The only jurisdiction this Court would have, under those circumstances, is to set aside the decree and to remit the Second Appeal for further hearing and disposal, in case this Court is inclined to view the disposal under the appeal as inadequate or imperfect.

We do not think it is necessary to proceed into this aspect at all, for, it appears to us that the disposal of the Second Appeal by the learned Judge (Ramakrishnan, J.) could be justified on a restricted aspect of the case, without at all canvassing the validity of the Union, or the possession of the L.M.S. Corporation *vis-a-vis* the L.M. Congregation at Marthandam, if there be one, after the Union had come into existence. The first appellate Court, as far as we are able to gather from the judgment, did not at all proceed into the factum of possession of the Church property on the date of the suit. For this purpose, we need not refer to the prior criminal proceedings under Section 143, Criminal Procedure Code., and that appears to

1. (1957) S.C.J. 439: (1957) 2 M.L.J. (S.C.) 1: (1957) 2 An.W.R. (S.C.) 1: A.I.R. 1957 S.C. 540.
2. L.R. (1950) 1 K.B. 574 at 579.

us to be of very little relevance or significance. There are two questions which alone arise for consideration, on this restricted aspect, and which are quite adequate to dispose of this appeal. The first is: who was the party in actual and lawful possession of the Church property on the date of suit? The second is: Is the defendant (appellant) claiming any right to possession or any other right whatever as a private individual, and, at the highest for him, a single member of the alleged congregation of Marthandam? The second question is equally important, for the simple reason that the plaintiffs do not accept that the defendant (appellant) is Secretary of any Church Committee, or that he represents such Committee, or even that there is such a Committee or a local congregation, which is opposing, or has opposed, the Union. According to the plaintiffs, this is simply a case of a party in a minority of one, attempting obstructionist tactics. As we pointed out earlier, the Church Committee is not a party, if there exists such a Committee and it will not be bound by this decision, which will not be *res judicata*. Either the Congregation of Marthandam outside the L.M.S. Corporation, or the Church Committee, will be perfectly at liberty to pursue all remedies at law, as advised, unaffected by this decision. It is obvious that, to the extent to which the appellant is a party, as a single private individual and member of the Congregation, he can claim no rights, and cannot even set up *jus tertii*, if the truth is that the Church was in the possession of the plaintiff on the date of suit. This is the restricted aspect on which the appeal can be very easily disposed of.

On that aspect, we find that there are explicit findings of the trial Court in favour of the plaintiffs, which are unambigous. Even if it be true that the learned District Judge has not referred to them, and that the learned Judge here (Ramakrishnan, J.) has not disposed of the Second Appeal on that basis, we do not see why it is necessary to remit the first appeal back for disposal, or call for any further finding, since the existing findings of fact by the trial Court are explicit, and have not been dissented from by any of the superior Courts. Under section 103, Civil Procedure Code, if we are of the view that the evidence on record is sufficient, we may certainly determine this issue of fact necessary for the disposal of the appeal. We find that, both in paragraphs 9 and 10 of the trial Court's judgment, there are explicit findings that the Church building was in the legal possession of the plaintiffs (L.M.S. Corporation) on the date of suit, and that the first defendant, as a private individual, had no shadow of possession in the property. In that view, the decree of the trial Court was rightly affirmed, and that decree does not affect the rights of the entire Congregation dissenting from the Union, if there be such a Congregation, or any Church Committee, independent of the L.M.S. Corporation, if it exists. For these reasons, we have, in exercise of our powers under section 103, Civil Procedure Code, examined the evidence for overselves, and we are satisfied that it supports the findings of the trial Court, embodied in paragraphs 9 and 10 of its judgment as to actual possession on the date of commencement of the litigation. On this finding alone, the Letters Patent Appeal by this single private individual (James Arthur Edwards) will have to fail. It is accordingly dismissed.

L.P.A. No. 12 *of* 1963 : As we observed earlier, this can be disposed of within a very brief compass. In this suit, which was for declaration of title and possession, the sole defendant (appellant) who is an alleged lessee with regard to a very small extent, put forward, in defence, the right of his lessor and his derivative right under Exhibit 1, dated 6th January, 1948, being an unstamped document of lease, said to have been executed by the defendant in favour of the L.M. Church, Arumana. We have examined this document, and we find that the period has expired long ago, and that, at the highest, the defendant (appellant) can only claim to be a lessee holding over, after the determination of the tenancy. The lessor is not a party to these proceedings, and, obviously, will not be bound by the decree herein. We have examined the evidence, and we are unable to see any justification for differing from the learned Judge (Ramakrishnan, J.) as to the disposal of this action on the merits. Actually, the trial Court held that the defendant had not proved his

title as lessee and possession under Exhibit-I; in that case, he was certainly liable to be evicted as a trespasser. But there is an undertaking submitted before us during the course of arguments, which we record here, by learned Counsel for the plaintiff, on behalf of the London Mission Society Corporation, that, if the defendant (appellant) is willing to attorn in writing to the plaintiff on the same terms, he will not be evicted from the plaint-schedule property, and may continue in possession as a recognised tenant. In the light of this undertaking, we dismiss the appeal, but with the modification that the decree for possession will be enforceable only if the defendant (appellant) does not execute a document, attorning to the L.M.S. Corporation on the same terms within three months from this date; if he attorns, the new tenancy will be recognised as valid, and the decree will not be enforceable as between the parties. The two appeals are disposed of accordingly.

The parties will bear their own costs here.

P.R.N. ——— *L.P.A. No. 13 dismissed; L.P.A. No. 12 dismissed with modification.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN.

The Management of Presidency Talkies (P.), Ltd., Madras .. *Petitioner**

v.

The Workmen employed in Presidency Talkies (P.), Ltd., Madras represented by the Secretary, South India Cinema Employees' Association, Madras and another .. *Respondents.*

Madras Medical Code (1959), *rule* 536 (3)—*Scope and applicability—Person employed in cinema theatre as ticket collector suffering from leprosy—Management refusing to continue his appointment and insisting on certificate as to his fitness for employment—Employee producing 'Non-infective' certificate subsequent 'disease arrested' certificate—Medical Officer not carrying on all necessary tests—Sufficiency—Labour Court directing re-instatement on basis of such certificates—Legality—Writ to quash—Constitution of India* (1950), *Article* 226.

A person employed as a ticket collector in a cinema theatre is brought into direct contact with members of the public who would include young children who are specially susceptible to infection from the disease of leprosy; and if such an employee happens to be suffering from leprosy, he should not be allowed to continue in duty unless he produces a certificate from a competent medical officer in regard to the condition of his disease and to his being free from it.

The Madras Medical Code which lays down the conditions for the issue of certificates and the tests to be performed in this respect makes a clear distinction between a 'Non-infective' certificate and a 'Quiescent' certificate and this applies not only to Government servants but also to persons who are not Government servants.

If an employee in the position of a ticket collector obtains only a 'Non-infective' certificate, the management of the theatre would be justified in refusing to permit him to return to duty, and is entitled to insist on his producing a 'Quiescent' certificate or a Cured certificate, after undergoing the requisite tests as laid down by rule 536 (3) of the Madras Medical Code.

The fact that a Medical Officer has given him a certificate that he had become 'disease arrested' would not entitle him to be re-instated, especially when the Medical Officer did not carry out all the tests as required by the Madras Medical Code. The Management would therefore be justified in refusing to re-instate him until he obtains a Quiescent certificate.

Where without taking into consideration this essential aspect as to whether the employee has really a quiescent stage and whether as a consequence he could be employed without risk to the public as a ticket collector the Labour Court passes an order directing the employee to be re-instated with back pay the order of the Labour Court is liable to be quashed under Article 226 of the Constitution.

Quaere: When is a person a 'leper' and when does he cease to be 'leper'?

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records in I.D. No. 22 of 1963 on the file of the Labour Court, Madras, and quash the Award dated 30th September, 1963 and made therein.

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* Writ Petition No. 1348 of 1963. 18th January, 1965.

N. C. Raghavachari, for Petitioner.

V. Krishnan, for 1st Respondent.

The Court made the following

ORDER.—This petition for the issue of a writ of *certiorari* under Article 226 of the Constitution is filed by the management of the Presidency Talkies (P.), Ltd. It is concerned with the question of employment of Sattar Khan who admittedly was working as ticket collector in the Paragon Talkies, a cinema theatre owned by the petitioner-management. The management had reason to suspect that Sattar Khan became afflicted with leprosy, and, therefore, before it could continue to employ him, insisted that he should produce a certificate from a competent medical officer in regard to the condition of his disease and to his being free from it. Two certificates from Dr. S. L. Ahmed, who is in charge of the Leprosy Department of the General Hospital, holding the rank of a Civil Surgeon, Exhibit M-4, dated 3rd August, 1962, and Exhibit W-21, dated 28th January, 1963 were filed in the Labour Court. Exhibit M-4 stated that Sattar Khan was rendered " non-infective " by treatment; that he was fit to resume duty as ticket collector, and that he may be permitted to work without let or hindrance. Exhibit W-21, given some months later, stated that Sattar Khan, an employee of Paragon Talkies, had become " disease arrested " that he was no danger to the public and that he might be employed without let or hindrance anywhere and was fit for duty. But the management contended that Exhibit W-21 was not produced by the worker before it, and that it was only produced in the Labour Court during the award enquiry. The management had only Exhibit M-4 before it, and, therefore, it held that that certificate which reported that the worker was non-infective, would not suffice to show that he had become cured of the disease ; it refused to employ him until such time, when he could produce a certificate showing that a cure had been effected in his case. This dispute about his non-employment was taken up by the Labour Union, and at its instance, a reference was made by the Government of Madras to the Labour Court to settle this as an industrial dispute. The Labour Court went into the matter at some length, and Dr. Ahmed, who gave the certificate Exhibit M-4 and later on the certificate Exhibit W-21, was examined and cross-examined. The Labour Court came to the conclusion that the certificate as well as the evidence of the doctor, showed that the management's stand was unreasonable in insisting upon a ' cured ' certificate, and it passed an award directing the worker to be re-instated with back-pay. The management has filed the present writ petition to quash the aforesaid order by a writ of *certiorari*.

Learned Counsel for the petitioner submitted that the employment of the worker in this case, Sattar Khan, as ticket collector, in a cinema theatre brings him into direct contact with members of the public, who would include young children, who are specially susceptible to infection from the disease of leprosy. The Madras Medical Code which has issued authoritative instructions to the Government Doctors, for the issue of certificates to patients suffering from leprosy, draws a clear distinction between a " Non-infective " certificate and a " Quiescent " certificate. The nature of these two certificates and the tests required to be performed before such certificates are issued, are given at pages 381 and 382 of Volume 1 of the Madras Medical Code, 5th Edition, 1959. Rule 536 (3) of the aforesaid Madras Medical Code states :

" A Government servant who is not engaged in any such occupations as that of school teacher personal servant or cook whose lesions are bacteriologically positive should be allowed to return to duty on presentation of a non-infectious certificate, subject to the condition that he continues treatment until he obtains a quiescent certificate. The period for reporting for re-examination in the case of infectious cases should be two years after a certificate of quiescence has been provided. A Government servant engaged in any of the following employments should not be allowed to return before the completion of a quiescent certificate : School teacher, child nurse, barber, dhobi, food-vendor, personal servant and any employment or occupation involving risk of infection to children."

It is stressed by the learned Counsel for the petitioner—in my opinion with justification —that Sattar Khan as ticket collector of a cinema theatre is engaged in an " occu-

pation involving risk of infection to children " and that in his case a 'Non-infective certificate' alone would not suffice to show a complete cure, but a 'Quiescent certificate' will be necessary, if we bear in mind the distinction which the Madras Medical Code has drawn between the two types of certificates and the necessity to insist upon a 'Quiescent certificate' before a person could be safely employed in a job where he comes into contact with young children. Unfortunately in the Labour Court this essential distinction had not been borne in mind. The doctor was questioned at length whether he held the requisite tests even before the grant of the 'Non-infective certificate'. His replies do not show that he did perform all the tests as required in the Madras Medical Code. His explanation for not doing so was that Sattar Khan became unconscious on the day on which he took the first smear, that is on 3rd August, 1962, and therefore he took one smear in this case instead of the prescribed three. He added that he had to take the physical condition of the patient into consideration and find out whether he would stand all the required tests. As a lay man, I can only say that the doctor's explanation for not conforming to the requirement of performing all the prescribed tests is not quite convincing. If a patient is suffering from an infectious disease, he should be declared free from it to enable him to be engaged in an occupation where the public come into contact with him. The reason that he was in a weak condition, can hardly be urged by the doctor for not examining him in the manner which the rules require, before a satisfactory certificate of fitness could be given. If the patient was too weak to stand all the tests, the Doctor should give him adequate tonic and medicine to restore him strength. That will not be a ground for shirking the performance of the required tests. But I do not want to say more on this aspect of the matter, lest we lose sight of what is essential in a case like this, namely, the obtaining of a 'Quiescent certificate' which admittedly has not been done and which, in the circumstances of the case, appears to be clearly required before the management could take him back to his old employment as ticket collector. In the Labour Court, this aspect has not been considered at all, either during the examination of the doctor or in the award of the Labour Court. No doubt the management in its counter in the Labour Court did not specifically refer to the requirement of a 'Quiescent certificate'. It has used the word 'cured' to enable the worker to mingle with the public as a ticket collector. It is not difficult to infer that what the management was really having in mind in using the word " cure " was a further stage in the curative treatment of leprosy, which takes the patient beyond the stage of non-infectivity, and which would enable him to come into contact with all sections of the public, young as well as old, without fear of infection. Obviously what was implied therein was a 'Quiescent certificate'.

That the Madras Medical Code provides a safe guidance in such cases even where the employee is not a Government servant, is clear from the admission of the doctor in his cross-examination, where he stated that in giving certificates both of non-infectivity and quiescent in leprosy cases, no distinction is made between Government servants and others. This is as it ought to be, because the standard of good health for a Government servant who comes into contact with the public can in no way be different from the standard of good health required for a non-Government servant who also has got to have dealings wih the public. Learned Counsel for the petitioner, drew my attention to a decision of the learned Chief Justice in *Sivaperumal Kounder* v. *Munuswami Kounder*[1], where dealing with the qualifcation of a Panchayat Board member under the Madras Village Panchayats Act, his Lordship held that even if the disease was found to be a non-infectious disease, it would attract the disqualification mentioned in section 16 (2) (*a*) of the Village Panchayats Act, which disqualifies a person for election as a member of the Panchayat, if he is a " leper " on the date of the nomination or election. But it is not necessary to decide for the purpose of this case when a person is a " leper " and when he ceases to be so. To all intents and purposes, the reaching of a quiescent stage is treated as sufficient evidence of a cure which would enable a person who had suffered from leprosy or

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1. C.R.P. No. 206 of 1961.

Hansen's disease, to mix freely with all sections of the public, including the very young, for whom the disease according to all authorities is considered specially infective.

I therefore allow the writ petition and quash the order of the Labour Court. The Labour Court will restore the case to its file and dispose it of afresh by considering the crucial point for determination whether the disease from which Sattar Khan was reported to be suffering an infectious type of leprosy—has really reached a quiescent stage and whether as a consequence he could be employed without risk to the public as a ticket collector under the petitioner-management. There will be no order as to costs.

P.R.N. ——— *Petition allowed; Order quashed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

Ismail Beevi (died) and another .. *Appellants**

v.

Sulaikkal Beevi and others .. *Respondents.*

Mohamedan Law—Gift—Hiba-bil-iwaz—Gift of property in consideration of promise to marry—If hiba or hiba-bil-iwaz—Validity without delivery of possession.

Civil Procedure Code (V of 1908), section 100—Finding of fact—Finding that purchase is not benami and that gift by owner was followed by delivery of possession—Conclusive character of.

A Mohamedan lady made a gift of a house to her brother's daughter as she had made necessary arrangements to marry the donee to her third son and the marriage took place a few days after the execution of the gift deed. The donee entered into possession of the property discharging the debts as directed by her mother-in-law by redeeming the property from a usufructuary mortgagee. Though the mother-in-law and her other sons continued to reside in the house the donee was entitled to file a suit for declaration and injunction restraining them from interfering with her possession. It cannot be said that the donee was not in exclusive possession and so could not file the suit. The gift was valid and the donee had title and possession.

A promise to marry is recognised as a valid consideration under the Mohamedan law for gift; that is particularly so, when, under that law marriage is only a contract. Anything which is a valid consideration under the law would be an *iwaz* and would therefore constitute proper consideration for a *hiba-bil-iwaz*. In such a case even if there be no delivery of possession the gift would be valid and the donee, would be entitled to maintain a suit for ejectment.

A finding by the lower appellate Court arrived at on overwhelming evidence that a purchase of property in the name of a lady was not *benami*, that she was the real owner and that a *hiba-bil-iwaz* executed by her was followed by delivery of possession in favour of the donee, is one of fact and will not be interfered with in Second Appeal.

Appeal against the Decree of the Court of the Subordinate Judge, Tirunelveli, in Appeal Suit No. 153 of 1960, preferred against the Decree of the Court of the District Munsif of Ambasamudram, in Original Suit No. 212 of 1959.

S. K. Ahmed Meeran and *M. Khaja Mohideen*, for Appellants.

T. R. Mani, for 1st Respondent.

The Court delivered the following

JUDGMENT.—This appeal arises out of a suit filed by the first respondent herein for a declaration of her title to the suit property and for a permanent injunction restraining the appellants and respondents 2 and 3 herein from interfering with her possession and enjoyment of that property. The first appellant herein (the first defendant) is the mother-in-law of the first respondent herein and the second appellant and respondents 2 and 3 are the sons of the first appellant.

The allegations in the plaint are that the suit property originally belonged absolutely to the first appellant (first defendant). Some time before the marriage of the first respondent with the son of the first appellant, first appellant executed a gift deed Exhibit A-1, dated 1st June, 1955 in her favour with a direction that the first respon-

* Second Appeal No. 640 of 1961. 22nd January, 1965.

dent (daughter-in-law) should discharge the debts to the extent of Rs. 700 and that after the marriage she would be entitled absolutely to the suit property. Accordingly, the marriage took place with the son of the first appellant, who is not a party to the suit. The first respondent entered into possession of the suit property. Ever since her marriage, she has been in continuous and exclusive possession of the suit property; but allowed her mother-in-law and her husband's brothers to remain in the house. Taking advantage of the situation, they began to interfere with her possession and enjoyment, with the result she had to file the suit, out of which the Second Appeal has arisen, for declaration of title and injunction.

The suit was resisted by the appellants and the second and third respondents (mother-in-law and her sons) alleging that the suit property was originally purchased *benami* in the name of the first appellant (mother-in-law), the consideration for the sale-price being contributed by her sons, that the gift deed was not acted upon, and, in any event, possession was not delivered to the first respondent (daughter-in-law); on the other hand, they continued to be in possession of the suit property. They further contended that the gift deed was invalid and illegal under the Mahomedan Law, that it was not binding on them and that the first respondent had no title to the suit property. On these pleadings, the parties went to trial.

The questions that arose for consideration in the trial Court were, whether the property belonged absolutely to the first defendant or belonged jointly to defendants 1 to 4 and the husband of the plaintiff, whether the gift deed, dated 1st June, 1955 relied on by the plaintiff was true, valid and binding on the defendants, whether possession was not delivered to the plaintiff on the date of gift and if so, the gift was not valid, and incidentally whether the plaintiff was in sole possession of the suit property on the date of the suit. The trial Court, after considering the oral and documentary evidence in this case, found that the property had been purchased by the defendants jointly in the name of the first defendant, that the plaintiff had not established possession on the date of the gift deed and that the plaintiff was not entitled to the relief claimed in the plaint. In the end, the District Munsif dismissed the suit of the first respondent. But on appeal, the learned Subordinate Judge, on a reconsideration of the evidence on record, came to the conclusion that the property was not purchased *benami*, that the first defendant was the real owner of the property, that the gift in favour of the daughter-in-law was *hiba-bil-iwaz* and not *hiba* and that there was delivery of possession in favour of the plaintiff. In the result, the suit was decreed as prayed for. Now the first defendant (mother-in-law) and one of her sons have filed the present appeal.

Mr. Ahmed Meeran, learned Counsel for the appellants, contended that the suit property belonged to all the defendants, that the defendants were in possession of the property along with the plaintiff, that possession was not delivered to the plaintiff on the alleged gift deed and that the gift deed itself was not valid and that therefore the suit was not maintainable.

I am not going to interfere with the finding of fact, *viz.*, that the sons of the first appellant did not prove that they provided the necessary funds for the purchase of the suit property *benami* in the name of their mother. When the first appellant executed the gift deed, two of her sons attested it. The lower appellate Court was, therefore, right in coming to the conclusion on overwhelming evidence that there was no *benami* purchase and that the first defendant (first appellant) was the real owner of the suit property.

Once I come to the conclusion that the first appellant was the real owner and was in absolute possession of the suit property, the only question for consideration is whether the gift deed executed by her is valid according to Mahomedan Law. Learned Counsel for the appellants contended before me that the lower appellate Court erred in setting up a new case and construing the gift as a *hiba-bil-iwaz* as the first respondent never put forward the case in her plaint that the gift was *hiba-bil-iwaz*, and that therefore it was not necessary for her to prove possession at

the time of the gift deed; nor was it necessary for her to prove that the gift deed was accompanied by possession of the suit property. Learned Counsel cited textual authority to prove that the gift deed in question is not *hiba-bil-iwaz* but *hiba* or simple gift. According to Mulla, a *hiba-bil-iwaz* is a gift for consideration which is in reality a sale and has all the incidents of a contract of sale and accordingly possession is not required to complete the transfer as it is in the case of a *hiba*. Learned Counsel contended that in the instant case, it was a simple gift, *hiba*, and in the case of *hiba*, it was absolutely necessary that possession should accompany the gift deed and once it was proved that possession was not delivered, it cannot be treated as a valid gift. There may be some force in the contention urged by learned Counsel, but I am not convinced with the arguments.

In *Tajunnisa Bibi Ammal* v. *Rahmath Bibi Ammal*[1], Ramachandra Iyer, J. (as he then was) had to consider, more or less on similar facts, whether the gift deed there was *hiba-bil-iwaz* or *hiba*. Now, it is necessary for me to state the facts of that case, as I am entirely relying on that decision as an authority, for the disposal of the case before me. The plaintiff in that case filed the suit to recover possession of the suit properties from the defendant, who was her mother's sister. The defendant's son was married to the plaintiff. Just before the marriage, the defendant effected a settlement by way of a gift of the suit properties on the plaintiff, in consideration of the marriage. The document was executed two days prior to the marriage. Subsequently, the husband abandoned the plaintiff and had taken another wife. The plaintiff, therefore, filed the suit, for recovery of possession of the suit properties from her mother-in-law. The suit was resisted on the ground that the gift was sham and not intended to be acted upon and that it could not validly convey the properties, as possession of the properties was not given to the plaintiff on the date of the gift. The learned Judge construed the document as a *hiba-bil-iwaz*, and he extracted the definition of *hiba-bil-iwaz* from Mulla's Mahomedan Law (14th Edition) at page 155 in section 168. The learned Judge observed that promise to marry had been recognised as a valid consideration, and that could particularly be so when under the Mahomedan Law the concept of marriage was that it was only a contract, and that therefore when the plaintiff (in the case cited) agreed to marry the defendant's son, there was sufficient consideration for the defendant to execute a settlement deed. The learned Judge observed:

> "Anything which is a valid consideration under the law would be an *iwaz*, and therefore would constitute proper consideration for a *hiba-bil-iwaz*. Applying that test I am of opinion that in the present case the settlement deed, Exhibit B-1, is only a *hiba-bil-iwaz*, the consideration thereof being the agreement to marry the defendant's son. In such a case even if there had been no delivery of possession, the gift would be valid and the plaintiff would be, entitled to maintain the suit for ejectment."

In the instant case, the gift deed came into existence just a few days before the marriage. The first appellant really intended to give her property to her brother's daughter. She intended to give away the suit property to her brother's daughter, as she had made the necessary arrangements to marry her to her third son. The marriage took place a few days after the execution of the gift deed. The plaintiff entered into possession of the suit property, by discharging the debts as directed by her mother-in-law, by paying the house-tax, in any event, from 1955 and also by exercising rights of ownership. In regard to possession of the suit property, it is seen that the property, at the time of the gift deed, was already under a usufructuary mortgage to one Nallasivan Chettiar and the donee was directed to discharge the debts. Before the gift deed, the first appellant (mother-in-law) was treated as a tenant under Nallasivan Chettiar. When she discharged the usufructuary mortgage, it must be deemed that she got possession of the property from the *othidar* through the help of her father. The lower appellate Court came to the right conclusion that the plaintiff was in possession of the suit property at the time of the institution of the suit. Still learned Counsel for the appellants would contend that it was proved beyond doubt that the first appellant and her sons continued to live in the suit house along with the first respondent and that therefore the first respondent was not

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1. (1959) 1 M.L.J. 221.

in exclusive possession of the suit property and hence could not file the suit for an injunction restraining the defendants from interfering with her possession. Here again, I am not able to follow the reasoning of learned Counsel, because once it is proved that the first appellant intended to give away or convey the ownershipof the suit property to her daughter-in-law, she is no longer the owner in legal language. The daughter-in-law, on account of the nearness of the relationship, allowed her mother-in-law and her husband's brothers to remain in the house. Because of that, they cannot assert that they are entitled in law to be in possession of the suit property. Their possession is not possession by right but possession by permission only. They are not within their legal rights to be in possession of the house. The lower appellate Court, therefore, came to the right conclusion, when it found that the first respondent herein (plaintiff) had established title and possession and that therefore she was entitled to the relief of declaration and injunction.

In the result, the Second Appeal is dismissed. This is a fit case where each party should bear its costs throughout. No leave.

P.R.N. ——— *Appeal dismissed ; Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Rajagopal Naidu .. *Appellant**

v.

Aiyyaswamy Chettiar and others .. *Respondents.*

Limitation Act (*IX of* 1908), *Article* 115—*Starting point—Contract—Breach—Agreement to perform specified act, in specified period—Breach by failure to do so—When complete—Cause of action—If postponed to date when promisee is able to fix or quantify his loss—Sections* 23 *and* 24—*Applicability.*

It is not the law that in every case of a breach of contract, limitation would commence to run not on the date of the breach, but only from the date when the party aggrieved was in a position to fix or quantify his damages. Different considerations would apply to a claim for indemnity. In a case of a simple breach of contract, where the breach is complete on the expiry of the period fixed for performance, time commences to run under Article 115 of the Limitation Act from the date of the breach. The fact that the plaintiff cannot file his suit that very day and that some time has to elapse for him to determine the quantum of damages cannot mean that limitation does not commence to run from the date of the breach. The suit ought to be instituted within three years from the date of the breach. The occasion for ascertainment of the degree of damages or the precise amount which would represent the injury suffered by the breach has to be distinguished from the date upon which the cause of the action arises and from which limitation begins to run.

There is no question of any continuing wrong in such a case within the meaning of section 23, Limitation Act or of any cause of action not accruing to the plaintiff on the date of the breach under section 24.

Appeal against the Decree of the Additional District Court, Coimbatore in Appeal Suit No. 374 of 1959, preferred against the Decree of the Court of the Subordinate Judge, Coimbatore in Original Suit No. 165 of 1957.

S. Nainar Sundaram, for Appellant.

T. R. Ramachandran and *R. Sivapunniyam*, for 1st Respondent.

P. S. Balakrishna Ayyar and *P. S. Ramachandran*, for 3rd to 6th Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff who has failed in the Courts below, on a question of limitation, is the appellant in this Second Appeal. The plaintiff had a subsisting lease with the 2nd defendant over a premises in a busy locality in Rangai Gowder Street, Coimbatore. During the currency of that lease, the 2nd defendant granted a lease to the 1st defendant. The plaintiff agreed to surrender his right as lessee over the premises and in consideration thereof, an agreement Exhibit A-2, dated 29th December, 1952, was entered into between the 1st and 2nd respondents to the effect that for a period of 15 days, at the time of Deepavali each year, the plaintiff would

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* Second Appeal No. 43 of 1962. 25th January, 1965.

be permitted to occupy the downstairs portion in the premises to sell crackers. Even though this agreement purports to be one between the 1st and 2nd defendants, the recitals of the agreement taken along with the fact that the plaintiff himself has signed this agreement, leave no room for doubt that the plaintiff also should be regarded as a party to the agreement.

On 17th October, 1953 the plaintiff issued a notice to both the defendants asking for possession of the premises for a period of 15 days as specified in the agreement. But this claim was repudiated by the defendants on 26th October, 1953. The result was that the plaintiff who had purchased crackers with a view to sell them during Deepavali season and make profit, could not do so, and from the evidence it appears that the plaintiff sold his entire stock only by 13th November, 1953. As the plaintiff was deprived of a good opportunity of carrying on business in Rangai Gowder Street, he sustained damage to the tune of Rs. 5,200. This sum of Rs. 5,200 is the loss which he had sustained in respect of the capital invested by him. It may be mentioned that the plaintiff filed the suit O.S. No. 302 of 1954 for enforcing his rights under the agreement Exhibit A-2 and the same has been dismissed. The Courts below have held that the suit O.S. No. 302 of 1954 does not operate as a bar to the present claim. Nothing turns upon this aspect of the matter. Both the Courts have held that the plaintiff had made out that he had sustained damages as stated above.

In paragraph 3 of the plaint, the plaintiff has admitted that under the agreement Exhibit A-2 he must be put in possession for a period of 15 days prior to Deepavali, so that, at the latest, the breach committed by the defendants had occurred on 6th November, 1953. It was contended in the Courts below that Article 115 of the Limitation Act would not apply to the facts of the instant case and that the case would be governed either by section 23 or section 24. I am unable to see how section 23 or section 24 has any application to the case. Learned Counsel for the petitioner drew my attention to some decisions dealing with a claim for damages between the vendor and vendee, in which it had been held that a cause of action for a suit for damages would commence to run not on the date of the contract or on the breach as such, but only when the vendor or the vendee, as the case may be, had sustained damages as a result of the claim put forward by a third party with a paramount claim. Learned Counsel relied on some of the observations contained in those decisions. I am of the opinion that those decisions are not relevant to the instant case and that the observations contained therein should not be divorced from their context and understood as authority for the position that in every case of a breach of contract, limitation would commence to run not on the date of the breach but only from the date when the party aggrieved was in a position to fix or quantify his damages. Entirely different considerations would apply to a claim for indemnity. This is a simple case of a breach of contract, the breach consisting in the plaintiff not being allowed to enjoy his promised right of a licence for a period of 15 days. Breach is complete when the time for putting the plaintiff in possession of the property had expired on 6th November, 1953, the date of Deepavali. The fact that the plaintiff could not file a suit that very day and that some time may have to lapse for him to determine the quantum of damages does not mean that limitation does not commence to run from the date of the breach. Learned Counsel for the respondents drew my attention to a Bench decision of this Court in *Soundararajan & Co. v. Annamalai*[1], in which it was contended that where a suit is filed for damages sustained upon a breach and consequent upon a re-sale, time would commence to run not from the date of the breach but only after the re-sale when the exact amount of damages could be ascertained by the plaintiff. This argument was not accepted and it was held that time would commence to run under Article 115 from the date of the breach. The matter was put thus by Anantanarayanan, J., delivering the judgment on behalf of the Bench :

1. A.I.R. 1960 Mad. 480.

"But we find, upon a scrutiny of the relevant dates, that this claim is definitely out of time. It ought to have been instituted within three years of the date of the breach of the contract, and it is no defence to this objection to urge that it was only the occasion of re-sale which enabled the defendant-firm to ascertain exactly the degree of damages, or the precise amount which would represent the injury suffered by them. The occasion for ascertainment will have to be distinguished from the date upon which the causes of action arose and from which limitation began to run."

The principle of the decision clearly applies to the instant case. The acceptance of the contention urged by learned Counsel for the appellant would be completely opposed to the scheme of Article 115 and sections 23 and 24 of the Limitation Act. In every case of a breach of contract for the sale of goods, the plaintiff who comes to Court has a duty to mitigate the damages and he may have to take certain steps with regard to the goods in question and it is only after such steps are taken by way of re-sale that the damages could be ascertained. That does not mean that the running of time is postponed till the damages are actually ascertained and after re-sale. In this case, there is no question of any continuing wrong within the meaning of section 23, nor is it a case in which a cause of action has not accrued to the plaintiff on the date of the breach, within the meaning of section 24. The Second Appeal is dismissed, but in the circumstances there will be no order as to costs here.

P. R. N. — *Appeal dismissed*
Leave refused.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE T. VENKATADRI.

S. Karuppiah .. *Petitioner**

v.

The Inspector of Panchayat and Collector of Ramanathapuram. .. *Respondent.*

Madras Panchayats Act (XXXV of 1958), sections 26 (a) and 25 (1)—Disqualification under—Offence involving moral delinquency—What is—Sentence of imprisonment till rising of Court—If imprisonment.

In general moral turpitude or moral delinquency is anything done contrary to justice, honesty, modesty or good morals. Whether an offence involves moral turpitude or not will necessarily depend on the circumstances in which the offence is committed. It is not every punishable act that can be considered to be an offence involving moral turpitude. Any grave criminal offence, which involves an element of guilty knowledge or *mens rea* will necessarily involve an element of moral delinquency.

Where a person is sentenced to imprisonment till the rising of the Court solely on the ground that he was present with the other accused as a person interested in the other accused, it cannot be held that he was in any way individually responsible for the offence (of being a member of an unlawful assembly to prevent the attached paddy being removed by a Receiver) or that he had the *mens rea* requisite to involve any moral delinquency. Hence such a conviction cannot attract the disqualification under sections 25 (1) and 26 (a) of the Madras Panchayats Act, 1958.

A sentence of imprisonment till the rising of the Court is also "imprisonment" within the meaning of the Penal Code and Criminal Procedure Code.

Petition under section 227 of the Constitution of India praying the High Court to revise the Order of the Court of the District Munsif, Srivilliputtur, dated 29th June, 1964, and made in O.P. No. 1 of 1964.

T. Selvaraj for *C. Ramanujan* and *J. Kanakaraj*, for Petitioner.

V. R. Venkataswami, for Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—An interesting question of law arises in this revision petition relating to the interpretation of section 26 of the Madras Panchayats Act, 1958. Section 26 (*a*) of the Act says:

Subject to the provisions of section 28, a member shall cease to hold office as such if he—

(*a*) is sentenced by a criminal Court to such punishment and for such offence as is described in sub-section (1) of section 25;

* C.R.P. No. 1259 of 1964. 18th December, 1964.

Section 25 (1) is in the following terms :

" A person who has been sentenced by a criminal Court to imprisonment for any offence involving moral delinquency (such sentence not having been reversed), shall be disqualified for election as a member.................."

The petitioner was elected as President of the Villappanur Panchayat in 1958. There was a civil proceeding, wherein a Receiver was appointed for standing crops. After the crops were harvested, the paddy was stored and time was given to the judgment-debtor in that proceeding for payment of the decree amount. On the appointed day, when the money was not paid, the Receiver, with the help of police, was taking steps to remove the paddy from the place where it was stored. It was at that stage the villagers appear to have prevented the Receiver from discharging his duties. The petitioner also happened to be in that crowd. There were criminal proceedings against the villagers including the President, for unlawful assembly. When the matter went on appeal, the President of the Panchayat was convicted and sentenced till the rising of the Court. The learned Sessions Judge of Ramanathapuram at Madurai made the following observation :

" He (the petitioner) had no personal interest in the matter and he has joined the unlawful assembly of the other accused in protesting against the carrying away of the paddy as he was the President of the local Panchayat interested in the other accused .... "

Now, in the order, out of which this revision petition arises, the learned District Munsif held that the petitioner had become disqualified under section 26 (*a*) of the Madras Panchayats Act, 1958 and that, by virtue of such disqualification, he had ceased to hold office as a member of the Panchayat.

Now the question for consideration in this revision petition is whether the petitioner is disqualified under section 26 (*a*) of the Act ; in other words, whether the imprisonment till the rising of the Court would involve any moral delinquency ?

In general, ' moral turpitude ' is anything done contrary to justice, honesty, modesty or good morals. ' Moral turpitude ' is defined in Words and Phrases ", Volume 27, page 541 as an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellowmen or to society in general, contrary to the accepted and customary rule of right and duty between man and man. Moral delinquency is rather a vague term and it may have different meanings in different contexts. In *Baleshwar Singh* v. *District Magistrate & Collector*[1], a learned Judge of the Allahabad High Court observed :

" The expression ' moral turpitude ' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and wickedness of character, or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellow-men or to the society in general. "

In *Durga Singh* v. *State of Punjab*[2], a Constable of the Punjab Police Force was found heavily drunk on a roadside and abusing passers-by. He was convicted by a Magistrate and he was also dismissed from service by the Department. The question was whether the action of the Constable involved any moral turpitude. The learned Judge of the Punjab High Court held, that the conviction involved moral turpitude. In *Mangali* v. *Chhakki Lal*[3], the Allahabad High Court observed :

" From consideration of the dictionary meaning of the words ' moral ' and ' turpitude ' as well as the real *ratio decidendi* of the cases the principle which emerges appears to be that the question whether a certain offence involves moral turpitude or not will necessarily depend on the circumstances in which the offence is committed. It is not every punishable act that can be considered to be an offence involving moral turpitude. Had that been so, the qualification ' involving moral turpitude ' would not have been used by the Legislature and it would have disqualified every person who had been convicted of any offence. The tests which should ordinarily be applied for judging whether a certain offence does or does not involve moral turpitude appear to be : (1) whether the act leading to a conviction was such as could shock the moral conscience of society in general, (2) whether the motive which led to the act was a base one and (3) whether on account of the act having been committed the perpetrator could be considered to be of a depraved character or a person who was to be looked down upon by the society . "

1. A.I.R. 1959 All. 71 at 74.
2. A.I.R. 1957 Punj. 97.
3. A.I.R. 1963 All. 527 at 528.

Anantanarayanan, J., in *Chelladurai* v. *Sornam*[1], made the following observation :

"........ it is certainly difficult to define what is an offence involving 'moral delinquency' and when an offence does not involve that element .... In my view, applying the approach of negative exclusion, which may be fruitful in such cases, it is clear enough that all technical and formal offences, and offences not involving *mens rea* would be automatically excluded. Next, an offence like a rash and negligent act causing the death of a person, may be presumably excluded, for, though rashness and negligence are states of mind, they do not involve a guilty intention, and are not states of mind *per se* transgressing the moral law .... After a careful consideration of this aspect, I am inclined to feel that any grave criminal offence, which involves an element of guilty knowledge and which thus transgresses the majesty of the law of crimes, will necessarily involve also an element of moral delinquency."

In *Sornam* v. *District Munsif and Election Tribunal*[2], where the election of a member to a Panchayat and also to the Presidentship thereof was questioned, on the ground that he had been convicted of an offence involving moral turpitude, in that he was one of 67 persons tried for various offences of criminal conspiracy to set fire and blow up railway bridges and the like and with the violation of the Explosive Substances Act for the purposes indicated, Srinivasan, J., held that the allegation of disqualification was made out as those offences must be regarded as offences involving moral delinquency.

Lord Denning, in his book "The Changing Law", has observed at page 112 as follows :

"In order to hold a person individually responsible for his crime, so as to be liable to punishment, it is obviously necessary that he should have a guilty mind."

In "*Mens rea* in Statutory Offences" by J.Ll.J. Edwards it is stated at page 249 :

"Where all that is meant is that the accused's conduct must be a voluntary expression of his will, this is a basic principle which runs throughout the whole field of criminal liability, whether the crime originated at common law or by statutory enactment, and whether the crime is one of absolute prohibition or one involving proof of a guilty mind. All that it involves is the principle that the act must be attributable to the accused, *i.e.*, it must have been done intentionally and not accidentally."

After reviewing all the authorities, I am of opinion that neither the conviction nor the punishment of the President (petitioner) involves any moral delinquency, as the learned Sessions Judge himself observed that the petitioner had no personal interest in the matter and that he joined the unlawful assembly of the other accused in protesting against the carrying away of the paddy, as he was the President of the local Panchayat interested in the other accused. Therefore, in the words of Lord Denning the President was not individually responsible for his crime, as he had no guilty mind. Since he had not the *mens rea* his action could not be held to involve any moral delinquency, and the petitioner would not, therefore, become disqualified under section 26 (*a*) of the Act.

The question whether imprisonment till the rising of the Court is imprisonment or not does not arise, as a Bench of this Court has categorically held in *Muthu Nadar*, In re.[3], that a direction by the Court that a person should be confined in the Court premises till the Court rose constituted imprisonment within the meaning of the Penal Code and the Code of Criminal Procedure. Learned Counsel also contended that the petitioner was elected under the Madras Village Panchayat Act, 1950 and he was not disqualified, as, under section 16 of that Act, he should have been sentenced for more than six months. But that question does not arise, since I have come to the conclusion that the petitioner did not commit any offence involving moral delinquency.

The Civil Revision Petition is, accordingly, allowed. But there will be no order as to costs.

R. M. *Petition allowed.*

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1. (1964) 1 M.L.J. 55 (57) : I.L.R. (1964) 1 Mad. 154.
2. (1964) 2 M.L.J. 426.
3. (1945) 1 M.L.J. 180.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE K. S. RAMAMURTI.

K. S. Subramania Iyer .. *Appellant**

v.

The Mylapore Hindu Permanent Fund, Ltd., Madras, suing by their Secretary Sri K. Vinayakam .. *Respondent.*

Madras City Tenants' Protection Act (III of 1922), as amended by Madras Act (XIX of 1955), sections 3, 9 and 12, Proviso—Scope of proviso to section 12—"Stipulation as to erection of buildings"—Meaning of—Proviso does not enable parties to contract out of benefits of section 9.

The expression " stipulation as to the erection of buildings " in the proviso to section 12 of the Madras City Tenants ' Protection Act should be strictly construed and would not include a stipulation to contract out of the benefits of section 9 in any manner. In other words, any stipulation by the tenant not to exercise his right to obtain a conveyance of the site under section 9 of the Act will be invalid and would not be saved by the proviso to section 12. Thus, any stipulation to surrender possession of the property with the superstructure erected by the tenant, or to accept as compensation any value other than the value to be determined under section 3 will not be such a term as will fall within the proviso to section 12, thereby disentitling the tenant to the benefits of section 9.

The lessee agreed to erect a building on the site leased to him according to certain specifications and covenanted to surrender possession of the entire property including the superstructure on the expiry of the lease. He agreed to receive only the value of the building then current or a sum of Rs. 5,000 whichever was less ;

Held, the stipulation regarding the superstructure to be erected by the tenant was not a 'stipulation' with regard to the erection of a building within the meaning of the proviso to section 12 and the tenant was not therefore disentitled to the benefits of section 9 of the Act.

Appeal under clause 15 of the Letters Patent against the Judgment and decree of the Honourable Mr. Justice Ramakrishnan dated the 30th day of January, 1963, and passed in Appeal No. 208 of 1960 (Appeal against the decree of the First Assistant Judge, City Civil Court, Madras, dated 10th December, 1959, and passed in Original Suit No. 796 of 1958).

P. B. Ananthachari, for Appellant.

R. Gopalaswami Ayyangar and *A. Seshan*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—This Letters Patent Appeal is from the Judgment of Ramakrishnan, J., in A.S. No. 208 of 1960, and involves a point of some interest and importance regarding the scheme, and the application of certain provisions of the Madras City Tenants' Protection Act, 1922, as amended by Madras Act XIX of 1955, to the established facts. It is true that the point centrally in issue is virtually concluded by the judgment of their Lordships of the Supreme Court in *N. Vajrapani Naidu* v. *The New Theatres Carnatic Talkies, Ltd.*[1], Still, as it has been contended before us that the elucidation in that judgment of section 12 of the Madras City Tenants' Protection Act, 1921 (hereafter termed the Act), may nevertheless not affect the particular contention of the learned counsel for lessor (The Mylapore Hindu Permanent Fund Limited, Madras), on the facts, the matter deserves careful scrutiny.

The background of the established facts may be set forth as follows. The plaintiffs are the Mylapore Hindu Permanent Fund Limited, represented by their Secretary, and they are the proprietors of the vacant land bearing No. 4/7, Ponnambala Vathiar Street, Mylapore. Admittedly a lease deed was executed between the plaintiffs and the defendant (lessee) on 30th April, 1947 (Exhibit A-1), with regard to this property for a period of ten years from 1st May, 1947. As the controversy really impinges upon certain of the mutual rights and obligations under this lease, as well as on a contention that the lease was not merely of the vacant land but also of a superstructure in one sense at least, *ab initio*, it is necessary to set forth *verbatim* the relevant parts of this document:—

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* L. P. A. No. 32 of 1963. 1st December, 1964.

1. (1965) 1 S.C.J. 368 : (1965) 1 M.L.J. (S.C.) 47 : (1965) 1 An.W.R. (S.C.) 47 : A.I.R. 1964 S.C. 1440.

The document, or the effective portion thereof, commences with the words :

"Whereas the lessor is the owner of vacant land No. 4/7, Ponnambala Vathiar Street, Mylapore more particularly described in the schedule given hereunder and whereas the lessee requested the lessors to lease to him the above land for the purpose of erecting a building and the lessors hereby agree to lease out the above land to the lessee."

Stipulation or condition 2 of the document is in the following terms:

"The lessee is permitted to put up a building at a cost of not more than Rs. 10,000 on the plot leased to him, after approval of the plan of the proposed building by the Board of Directors of the lessors, and the construction to be put must be in accordance with the plan approved by the Directors of the lessors."

Stipulation or Term No. 4, which is of considerable significance in the controversy, is as follows :

"The lease shall be in force for a term of ten years commencing from the First day of May, 1947, and on the expiry thereof the lessee shall surrender possession of the entire property and the constructions if any thereon. On vacating or giving possession as above the lessors shall pay the valuation thereof, then current, or the sum of Rs. 5,000 whichever is less."

Stipulation No. 6 is to the following effect :

"The lessee shall make his own arrangements for providing a garage to Mr. P. Somasundaram who is now the tenant with the lessors. The present garage will be dismantled and the materials shall be taken by and sold by the lessors."

Term No. 9 is to the effect :

"In case of breach or infringement of any of the conditions above mentioned by the lessee, the lessors are at liberty to determine the lease irrespective of the period provided herein by giving three months' notice to the lessee and the lessors may take possession of the property themselves without any compensation."

Under Term No. 10 it is reiterated that the lease is "of the vacant site for ten years".

In paragraph 4 (*a*) of the plaint there was an averment that, on the very date of the lease, the property leased out was not merely a vacant land of the lessors, but also included a garage then occupied by Mr. P. Somasundaram as tenant. The argument was that, therefore, the lease was not of the vacant land *per se*, and that the defendant (tenant) hence is not entitled to the benefit of certain provisions of the Act. Dealing with this argument, the learned Judge (Ramakrishnan, J.) referred to clause 6 of the lease, extracted above, and pointed out that the inference was not at all justified, on the facts, that the site with the garage thereon formed the subject-matter of the lease. On the contrary the document unambiguously affirms, in more than one operative part, that it was the vacant land that was the subject of the lease. We have no doubt, reading the document and the schedule thereto with care, that it was a vacant land which was the subject-matter of the demise, and that any building or garage was clearly excluded. It may also be mentioned that this view of the document is amply supported by the evidence on record adverted to in the judgment of the trial Court and that of Ramakrishnan, J. The tenant (defendant) would certainly be entitled to the benefits of the City Tenants' Protection Act, unless the view of the learned Judge is to be upheld that he was not so entitled because stipulation No. 4 of the lease concerning the superstructure to be subsequently erected, fell within the proviso to section 12 of the Act. It is in this context that we have to scrutinise the scheme of the Act itself and the prior case-law, including the recent elucidation of the scope of the proviso in the judgment of the Supreme Court in *N. Vajrapani Naidu* v. *The New Theatres Carnatic Talkies, Ltd.*[1].

Section 2 (4) of the Act contains the definition of "Tenant" and this need not detain us further. We may briefly note that it would include a person who continues to be in possession of the land after the determination of the tenancy agreement. Under section 3 of the Act,

"Every tenant shall on ejectment be entitled to be paid as compensation the value of any building which may have been erected by him or by any of his predecessor in interest, or by any person not in occupation at the time of the ejectment who derived title from either of them."......

1. (1965) 1 S.C.J. 368 : (1965) 1 M.L.J. (S.C.) 47 : (1965) 1 An.W.R. (S.C.) 47 : A.I.R. 1964 S.C. 1440.

Under section 9,

"Any tenant who is entitled to compensation under section 3 and against whom a suit in ejectment has been instituted or proceeding under section 41 of the Presidency Small Causes Courts Act, 1882, taken by the landlord may........apply to the Court for an order that the landlord shall be directed to sell for a price to be fixed by the Court, the whole or part of the extent of land specified in the application."

Section 12, which is of cardinal significance on the present facts, is in two parts, a clause affirming the rights of the tenant to benefits under the Act, and a proviso thereto. It runs as follows:—

"Nothing in any contract made by a tenant shall take away or limit his right under this Act, provided that nothing herein contained shall affect any stipulation made by the tenant in writing registered as to the erection of buildings in so far as they relate to buildings erected after the date of the contract."

The controversy, on the present facts, may now be elucidated. The lessee agreed to erect a building on the site according to certain specifications, and covenanted to surrender possession of the entire property including the superstructure, on the expiry of the lease. He agreed to receive only the current value of the building or a sum of Rs. 5,000 whichever was less. If this has to be construed as a "stipulation" binding upon the tenant, with regard "to the erection of a building," the proviso to section 12, will obviously inhibit the right of the tenant to invoke the benefit under section 9 of the Act. If the matter is to be viewed apart from the Act, it would clearly be governed by the law of leasehold in this country with particular reference to section 108 (*h*) of the Transfer of Property Act. In *Narayan Das* v. *Jatindara Nath*[1], the Judicial Committee, affirming the dicta of Sir Barnes Peacock in *Thakoor Chunder Poramanick* v. *Ramdhone Bhuttacharjee*[2], expounded the situation in law by the following citations:

"We have not been able to find in the laws or customs of this country any traces of the existence of an absolute rule of law that whatever is affixed or built on the soil becomes a part of it, and is subjected to the same rights of property as the soil itself."

"We cannot, however, apply to cases arising in India the doctrine of the English law as to buildings, *viz*., that they should belong to the owner of the land. The only doctrine which we can apply is the doctrine established in India that the party so building on another's land should be allowed to remove the materials." *Vallabhdas Naranji* v. *Development Officer, Bandra*[3].

(Vide also *Dr. K. A. Dhairyawan* v. *J. R. Thakur*.[4]) Upon this part of the case, obviously, and as the learned Judge has pointed out, the situation will be that the lessee has to remove the superstructure even while he is in possession of the property, but this is qualified by the opening part of section 108 of the Transfer of Property Act "In the absence of a contract or local usage to the contrary". Hence, we have to look to the contract in the case, in conjunction with sections 3 and 9 of the Act, read along with section 12, and, especially, the proviso forming the latter part of that section.

The prior case-law on this matter may be briefly noted, but it is merely of historical interest, since the point in actual issue is concluded by the dicta of the Supreme Court in *N. Vajrapani Naidu* v. *The New Theatres Carnatic Talkies, Ltd.*[5], earlier referred to. In *Thayarammal* v. *Junus Chettiar*[6], Pandurang Rao, J., took the view that the proviso applied "only to stipulations regarding the erection of builings" that is to say, stipulations restraining the right of the tenant to build such buildings as he likes either as regards the size, their costs, their situation and so on, and it certainly cannot relate to stipulations cutting down or extinguishing altogether the right of the tenant to get compensation in respect of buildings built by him which is given to him by the Act. In *Ponnambala Achary* v. *Mani*[7], Ramachandra Iyer, J., (as he then was) construed section 9 itself as not being subject, in its terms, to any contract between the parties; hence, section 12 cannot be so construed as to enable the parties to contract out of the statute. It applied only to stipulations regarding

1. (1926) 53 M.L.J. 158 : L.R. 54 I.A. 218.
2. 6 Suth. W.R. 228.
3. (1929) 57 M.L.J. 139 : L.R. 56 I.A. 259.
4. (1958) S.C.J. 1060 : A.I.R. 1958 S.C. 789 at 792.
5. (1965) 1 S.C.J. 368 : (1965) 1 M.L.J. (S.C.) 47 : (1965) 1 An.W.R. (S.C.) 47 : A.I.R. 1964 S.C. 1440.
6. A.I.R. 1936 Mad. 844.
7. (1958) 2 M.L.J. 516.

" the erection of buildings " in the restricted sense. In *Vajrapuri* v. *New Theatres Carnatic Talkies Ltd.*[1], which led to the Supreme Court appeal that we shall later refer to, the Bench of Rajamannar, C.J., and Ganapatia Pillai, J., held that the proviso to section 12 should not be construed in a manner that would abrogate the protection given to the tenant by the first part of the section. But another Bench decision of this Court falls to be considered, and that is *Palaniappa Goundar* v. *Sridharan Nair*[2]. The argument in that case was that the lessee was not entitled to claim compensation for the superstructure under section 9 at all, because according to the terms of the contract, he agreed to give up possession of the building without claiming compensation at the expiry of the lease. If, by the terms of the contract, the building put up by the tenant became the property of the landlord on the date of termination of the tenancy, the tenant could not claim compensation, or exercise any right under section 9 of the Act. The latter part of the arguments in the case related to the proviso to section 12, and the true scope of the expression " stipulations.........as to the erection of buildings " occurring therein. The Bench held that a term or condition that the building put up by the tenant becomes the property of the landlord, on the termination of the tenancy, will be such a stipulation, saved by the proviso to section 12 of the Act, thereby disentitling the tenant to benefits under section 9. At page 564, definitions of the term " stipulation " from the Shorter Oxford Dictionary are extracted, and set forth.

We shall now turn to the judgment of the Supreme Court in *M. Vajrapani Naidu* v. *The New Theatres Carnatic Talkies, Ltd.*[3]. That was also a case in which the stipulation was that if, after the termination of the period, the lessees failed to pay the arrears of rent, and to hand over possession of the site, to the lessors, after dismantling the constructions, the lessors had the right to take possession through Court of the site, after demolition of the buildings thereon. The relevant part of the judgment of their Lordships which elucidates the true scope of section 12 in relation to section 9 (1) is of the utmost importance, in the present context of facts, and with regard to cases very similar on the facts that arose previously in this Court ; hence, we are setting forth below this part of the judgment in entirety ;

"Section 12 of the Act consists of two parts ; by the first part it enacts that the rights conferred upon the tenant under the Act may not be taken away or limited by any contract made by a tenant. Such rights would, amongst others, include the right to claim compensation under sections 3 and 4 and the right to purchase the land from the lessor by order of the Court under section 9. By the second part of the section 12, the protection granted by the first part doe not avail the tenant in certain conditions. If there be a 'stipulation as to the erection of buildings' made by the tenant in writing registered, in so far as it relates to buildings erected after the date of the contract, the protection conferred by the first part of section 12 shall not apply. A covenant in a lease which is duly registered that the teant shall on expiry of the lease remove the buildings constructed by him and deliver vacant possession, is undoubtedly a stipulation relating to the building, but it is not a stipulation as to erection of building. Section 2 has manifestly been enacted to effectuate the object of the Act which is set out in the Preamble *viz.*, to give protection to tenants.....who have constructed buildings on others' lands in the hope that they would not be evicted so long as they pay a fair rent for the land." The Legislature has sought thereby to protect tenants against any contractual engagements which may have been made expressly or by implication to deprive themselves wholly or partially of the protection intended to be conferred by the statute. And the only class of cases in which the protection becomes ineffective is where the tenant has made a stipulation in writing registered as to the erection of buildings, erected after the date of the contract of lease. The restriction is therefore made only in respect of a limited class of cases which expressly attract the description of the stipulations as to the erection of buildings. Having regard to the object of the Act, and the language used by the Legislature, the exception must be strictly construed, and a stipulation as to the erection of buildings would not, according to the ordinary meaning of the words, used encompass a stipulation to vacate and deliver possession of the land on the expiry of the lease without claiming to enforce the statutory rights conferred upon the tenant by section 9. The stipulations not protected in section 12 are only those in writing registered and relate to erection of buildings such as restrictions about the size and nature of the building constructed, the building materials to be used therein and the purpose for which the building is to be utilised. It is true that the operative part of section 12 protects the tenant against the deprivation of limitation of his rights under the Act and the rights conferred by the Act do not directly relate to covenants relating to erection of buildings. But on that account it is not possible to give a wider

1. (1959) 2 M.L.J. 469.
2. (1963) 2 M.L.J. 559.
3. (1965) 1 S.C.J. 368 : (1965) 1 M.L.J. (S.C.) 47 : (1965) 1 An.W.R. (S.C.) 47 : A.I.R. 1964 S.C. 1440 (1443).

meaning to the expression 'as to the erection of buildings' that the stipulation as to the building would include stipulations to remove buildings on the determination of the lease. It cannot be said that the literal meaning of the expression is likely to render the exception ineffective, for stipulation concerning erection of buildings in registered leases or contracts subsequent to the leases providing for forfeiture on failure to comply with the terms of the lease relating to the erection of buildings may undoubtedly involve limitations or deprivation of the rights of the tenant under the Act and to that extent the protection conferred by section 12 in favour of the landlord may be lost. The construction for which the appellant contends assigns no meaning to the words "as to the erection of buildings" and makes them superfluous; besides it materially affects the scope of the relief which the Act obviously extends to the tenants falling under its provisions."

Upon these criteria, the matter would thus appear to us to be clear beyond dispute. The proviso to section 12 will not affect the rights of the lessee under section 3 read with section 9 or the recitals in Exhibit A-1 or similar recitals in a document of lease. It would have been a different matter, of course, if the stipulation concerning the "size and nature of the building constructed, the building materials to be used therein, and the purpose for which the building is to be utilised" had been infringed, and thereby the tenant became disentitled to benefits of section 9; but that is not the argument here. It is very clear that any stipulation to surrender possession of the property with the superstructure, or to accept as compensation any value other than the value to be determined under section 3, will not be such a term as will fall within the proviso to section 12, thereby disentitling the tenant to the benefits of section 9 of the Act.

Learned Counsel for the lessor (Sri R. Gopalaswami Ayyangar) has drawn our attention to certain parts of the minority judgment delivered by Ayyangar, J., in the very case. Particular reference is made to an argument which conceded that a stipulation which would limit the quantum of compensation payable in respect of buildings constructed by a tenant, provided for by section 3, would be one within the scope of the proviso to section 12. It is also stressed that the construction of the language of the relevant part of the Act to the effect that the stipulation is intended to be one which "bears on or is in relation to the erection of buildings" would reconcile the proviso with the Preamble, which sets out the object to be achieved by the Act. But, however, that aspect might be viewed, it is indisputable that the enunciation of the law by their Lordships is unambiguously to the effect that the expression "as to the erection of buildings" should be strictly construed and would not include a stipulation to remove the building on the determination of the lease or to contract out of the benefits of section 9 in any manner. In other words, any stipulation by the tenant not to exercise his right to obtain a conveyance of the site under section 9 of the Act will be invalid and would not be saved by the proviso to section 12. In this view, therefore, the conclusion of the learned Judge, (Ramakrishnan, J.) allowing the appeal cannot be sustained. The decree of the trial Court has to be restored and the matter has now to go back for the action being taken on the application of the tenant under section 9 of the Act. The appellant (tenant) will have his costs throughout.

V. K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE T. VENKATADRI.

S. Kannappa Pillai and another .. *Appellants**

v.

B. Venkataratnam .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XXV of 1949) and (XVIII of 1961)—Order of exemption of premises conditional—Reconstruction within certain time and allotment to old tenants—Order, if binding on the landlord—Order obligatory, mandatory or directory—Premises losing identity after demolition and reconstruction—Tenant, if entitled to be put in possession of old portions—Injunction restraining landlord from letting out to others—Conduct of tenant, relevant in denying equitable relief of injunction.

The order passed by the Government is not a statutory order. It may be a mere direction or instruction involving invalidating consequences in its disregard. The order is a jumble of

* Second Appeal Nos. 107 and 458 of 1962. 4th December, 1964.

provisions, legislative or administrative or directional in character. The order of exemption directing the landlord to take back the old tenants into the reconstructed building is not binding on the landlord.

Where there is a change in the identity of the premises as a result of the reconstruction or structural alteration, the tenants are not entitled to claim the back portions occupied by them previous to the reconstruction.

The conduct of the tenants in obstructing the landlord from getting possession and doing the work of reconstruction resulting in considerable delay, would disentitle the tenants from getting the equitable relief of injunction restraining the landlord from letting out the premises to others.

Appeals against the decrees of the Principal Judge, City Civil Court, Madras in Appeal Suit Nos. 163 and 164 of 1960 respectively preferred against the decrees of the Fourth Assistant Judge, City Civil Court, Madras in Original Suit Nos. 2237 and 2238 of 1957 respectively.

R. Vaidyanathan and *C. T. Varghese*, for Appellants.

T. T. Vijayaraghavan and *M. R. Narasimhan*, for Respondent.

The Cout delivered the following

JUDGMENT :—These two appeals arise out of the suits filed by the appellant in each of the appeals for an injunction restraining the respondent (landlord) from letting or agreeing to let the portions set out in the plaint schedule to any tenant contrary to their rights and also for an injunction directing the respondent to relinquish the said portions to the appellants within the time to be fixed by the Court for the appellant's occupation on fair rent basis and for costs.

The respondent is the owner of the building facing Perumal Mudali Street on the east and China Bazaar Road on the South, bearing municipal door No. 1, Perumal Mudali Street, and 193 and 194, China Bazaar Road. The appellants in the Second Appeals were the tenants in portions of the building. The respondent-landlord wasted to reconstruct the entire premises, and he was trying to get vacant possession of the portions occupied by these tenants. Finally, he applied to the Government to exempt the premises under section 13 of the Madras Buildings (Lease and Rent Control) Act, 1949, from all the provisions of the said Act, in order to enable the landlord to carry out the reconstruction of the premises. After a lengthy correspondence between the Government, the landlord and the tenants, the Government by their order dated 9th November, 1955, exempted the premises in question from all the provisions of the Act subject however to two conditions, *viz.*, that the landlord should complete the reconstruction of the premises within four months from the date the premises were vacated by the tenants and that he should take back the old tenants into the reconstructed building at the rents demanded by the landlord subject to the fixation of fair rent. The landlord approached the tenants seeking their co-operation for the purposes of vacating the premises to enable him to carry out the repairs and reconstruction. In spite of the order passed by the Government, the tenants disputed the right of the Government to grant exemption and also challenged the necessity for effecting alterations and repairs. The landlord filed ejectment suits against the tenants. In the meantime, the tenants filed a writ petition, W.P. No. 67 of 1956, in this Court, to quash the order of the Government dated 9th November, 1955, and also obtained stay of trail of the ejectment suits pending disposal of the writ petition. Finally the writ petition came up for hearing before Rajagopala Iyengar, J. The learned Judge dismissed the petition, as there was no ground for interference with the order of the Government exempting the building under section 13 from the operation of the Rent Control Act. The learned Judge did not see any impropriety or illegality in the order of exemption for enabling a building to be reconstructed. The tenants filed a writ appeal against the order of Rajagopala Iyengar, J. When the matter came up before the Bench consisting of Rajamannar, Chief Justice and Panchapakesa Ayyar, J., the learned Judges observed that the order of exemption passed by the Government was neither perverse nor illegal. The writ appeal also was dismissed. After the dismissal of the writ appeal, the ejectment suits were taken up for disposal, and by consent, the appellants

(tenants) agreed to vacate the premises on 15th March, 1957. While giving possession, the tenant wrote a letter Exhibit-29, requiring the landlord to complete the reconstruction within the period mentioned in the Government Order and to give the tenants the portions which were in their occupation, as per order of the Government dated 9th November, 1955. The respondent-landlord replied to this notice contending that, as the appellants-tenants did not vacate as per the Government Order, they had to rights for re-occupation under the said Government Order. Again, while the reconstruction of the building was in progress, the appellants issued a notice Exhibit-33 through their Counsel, requiring the respondent-landlord to intimate to them as to when the building would be ready for occupation, what portions would be assigned to them and at what rates. To this, the landlord replied that the tenants had no right of re-occupation. This reply provoked the tenants and they filed the suits above mentioned for injunction restraining the respondent-land lord from letting out or agreeing to let the portions previoulsy occupied by them to any other person contrary to their rights. Along with the suits, the tenants filed a petition for an interim injunction restraining the respondent from letting out the portions to third parties. In spite of it, the landlord had let out the portions to different tenants and that necessitated the appellants-tenants amending the plaint by adding another relief by way of a mandatory injunction directing the landlord to relinquish the respective portions to them.

The respondent—landlord took up a definite stand stating that the appellant—tenants, having questioned the validity of the Government Order exempting the building from the provisions of the Rent Control Act, were no longer entitled to the benefits conferred under the Government Order, that the appellants, not having vacated the premises in pursuance of the Government Order, had lost the benefits under the Government Order, that the portions which were occupied by the appellants before the reconstruction were no longer in existence after reconstruction, that, as such, the appellants were not entitled to enforce their rights, if any, in respect of the portions in the reconstructed building and that the declaration and injunction asked for by the appellants were discretionary remedies and they were therefore not entitled to seek any equitable relief. On these pleadings, the parties went to trial before the IV. Assistant Judge, City Civil Court.

The learned Judge held that it was not open to the respondent-landlord to escape the obligations imposed on him under the Government Order on the ground that the appellants-tenants were not parties to the said order, that it was not open to him to say that the old portions in the occupation of the appellants were no longer in existence and that the building having been exempted from the operation of the Rent Control Act for the time being for the purpose of enabling the landlord to effect the necessary repairs and reconstruction, the provisions of the Act would automatically apply to the building after reconstruction. In the result, the suits were decreed as prayed for.

But on appeal, the learned Principal Judge of the City Civil Court held that the suits were not maintainable, as the tenants did not ask for possession of the suit premises after reconstruction, and as there was no identity in the portions occupied by the tenants, they could not ask the landlord to relinquish the portions to them. On these findings he dismissed the suits of the tenants. Against the dismissal of their suits, the tenants have now preferred the Second Appeals.

The important points for consideration are whether the order of the Government dated 9th November, 1955, directing the landlord to take back the old tenants into the reconstructed building subject to the fixation of fair rent is mandatory or obligatory or merely directory, and whether there is any change in the identity of the portions after the reconstruction of the building and if so whether the tenants are entitled to call upon the landlord to give them back the portions previously occupied by them.

Taking the first point, I have to consider whether it is an order or rule or regulation imposed by the Government on the landlord at the time of the passing of the

order. Rules and regulations are usually intended to be of general application throughout the State, whereas the orders will have limited application to specific places, persons or class of persons. Sometimes the order may be in the form of a direction. The distinction between an order and a direction has been well brought out in the case of *Simms Motor Units* v. *Minister of Labour*[1]. In that case, which arose under the Essential Works Orders, the Minister had issued general instructions to National Service Officers about the conditions on which they were to reinstate employees who had been dismissed for serious misconduct. But Defence Regulation 58-A, which concerned the control of employment, provided that the Minister should exercise his powers ' by order ', and the Court held that a mere direction did not satisfy that requirement. Lynskey, J., delivering the Judgment of the Court, held :

> " In our view, the Minister cannot by instructions limit the discretion of his national service officer but he must carry out his orders, as distinct from his instructions........."

I cannot say that the order passed by the Government is a statutory order. In his book, Law and Orders, Sir Allen says at page 10:

> " To-day, besides rules, regulations and orders we have to reckon with a multitude of directions, circulars, pamphlets, letters and other departmental communications, even telephone talks...... The legal status and effect of all this official literature is most obscure. Sometimes it is obviously administrative ; Sometimes it is merely informative or advisory ; sometimes it conveys individual decisions which are not necessarily binding and can be repudiated at will ; and sometimes it is of such wide extension that it appears to be a form of legislation of general effect. The clearest distinction which seems to emerge is that a rule, regulation or order frequently, though not invariably, involves some kind of parliamentary process, or at least cognizance, whereas directions and all their kindred emanate solely from Whitehall and are never seen in Westminister ; but this will not always hold good as a test,........".

Now the order passed by the Government may be a mere direction or instruction involving no invalidating consequences in its disregard. If the order is disobeyed, it is only nullified. It is true that by such disobedience it may cause inconvenience or injustice to innocent persons or advantage to those guilty of neglect. But the order must be in consonance with the scope and object of the enactment. Parker, in his book on Administrative Law says at page 215 :

> " A decision, to be binding to at least some extent must be issued pursuant to law by the agency or organ to which the making of decisions has been lawfully assigned or validly delegated."

The order is a jumble of provisions, legislative or administrative or directional in character. It is not expressed in precise language of the Act but by mere colloquial language of the correspondence. It says that the building is exempted, but, at the same time, a direction has been given to the landlord that he should take back the old tenants after reconstruction of the building. There is nothing in the Act—Madras Buildings (Lease and Rent Control) Act, 1949,—to direct the landlord to give back the portions occupied by the tenants after its reconstruction. The landlord, applied to the Government to exempt the building from the provisions of the Act. It is only in the present Act that there is a provision that the landlord after reconstruction and repairs, must give back to the tenants the portions occupied by the tenants. Only in the case of absolute demolition, the Act will cease to apply. Therefore the order passed by the Home Department directing the landlord to take back the old tenants into the reconstructed building is not binding on the landlord.

The next question that arises for consideration is whether the tenants are entitled to get the portions occupied by them previously after reconstruction of the building ; in other words, are they entitled to get back the portions of the premises even though the portions are not in the same condition as they were before reconstruction ? To answer this question, I have to consider the material on the evidence to see whether there is any radical change in the portions after reconstruction. The learned Principal Judge has observed in paragraphs 10 and 11 as follows :

> " The plaintiff in O. S. No. 2237 of 1957 was occupying No. 1 shop facing Perumal Mudali street. That shop measured 16'3" south to north and 10' east to west. Immediately to the north of his shop, was a staircase and below the staircase was the shop of one Muthukrishna, another

1. (1945) 2 All E.R. 201.

tenant. To the north of Muthukrishna's shop there were other tenants in the same building. The plaintiff in O.S.No. 2238 of 1957 was occupying the eastern most shop bearing door No. 194 abutting China Bazaar Road. That shop measured 9' by 10'. There was another shop to the west of it bearing door No. 193. After reconstruction, instead of two shops No. 193 and 194, facing China Bazzar Road, there was only one shop measuring 17' west to east and 21' 9" south to north. At the east end a staircase has come into existence and it occupied a space of 3' 5". There is a wall between staircase and the shop.

"................more than ⅓rd area of previous door No. 194 is now occupied by a staircase, and it is not now possible for the appellant to grant any lease for the former portion occupied by the plaintiff in O.S. No. 2238 of 1957. By extension the China Bazaar Road shop further north, a portion of the shop which was in occupation of plaintiff in O.S. No. 2237 of 1957 ceased to exist. All the dividing walls in the shop abutting Perumal Mudali Street have been removed and is the total area facing Perumal Mudali Street there are now four shops each measuring 9'3" south to north and 22'9" west to east. Former portions of the premises as such ceased to exist.........."

Now on these materials, can the tenants ask the landlord to give them back the portions occupied by them previously. There may be such alterations in the premises by reason of reconstruction or structural alteration that the original premises may lose their identity. In deciding this question, the Court must take into account the nature of the premises the cost of the alterations, the nature extent and effect of the alterations, and improvements made and then ask itself whether having regard to these considerations, the premises let to the tenant now constitute substantially the same premises as they were let before reconstruction. Many cases have been decided on this aspect of the matter in the Court of Appeal from time to time and principles have been laid down. For instance, in *Philips* v. *Barnett*[1], there were three adjoining dwelling houses to each of which the Rent (Restriction) Act, 1915 applied. The owner converted the houses into a factory in such a way that the three houses ceased to exist. The question arose whether it was a new building or a old building. Bankes, L.J., held :

"..........So long as they remained identifiable they continued subject to the provisions of that statute, but when they lost their identity the statute no longer applied any more than it would apply if instead of being structurally altered the three houses had been pulled down and a new building had been erected on their site..........the identity of the three houses can no longer be maintained; the building which has replaced them is a new building......."

In the same case, Atkin L.J., observed at page 227 as follows :

"It is said that this question whether the original houses lost their identity is a question of fact which must have been answered by the County Court Judge in favour of the appellants. In my opinion the question involves matter of law. As matters of law the only inference that can properly be drawn from the facts is that this building first came into existence when it was let to the appellants and is not identical with the houses."

In *Sinclair* v. *Powel* [2], a dwelling house was converted into three separate self-contained flats. Bankes, L.J., following the principle laid down in the previous case, observed :

"The Court, whenever called upon to consider the question, must be astute to see that a landlord is not evading the restriction upon increases of rent imposed by the statute by some mere alteration in the character of the lettings, or by small, and possibly colourable, alterations of the structure, or by a mere sub-dividing of the tenement."

In *Marchbank* v. *Campbell*[3], the upper part of a dwelling house was converted into a separate flat by means of structural alterations. The qusetion was whether it was a new building. Salter, J., who delivered the Judgment of the Court, made the following observation :

"In my opinion, this is a question of fact and depends on the nature and extent of the structural alteration. It is a question of the physical identity of the applicant's dwelling house. To justify a judge in finding that the part was first let when it was first let separately there must be, in his opinion, not merely a new and separate dwelling house in law, by virtue of a new and separate letting, but a new and separate dwelling house in fact by virtue of substantial structural alteration. When a landlord, by enterprise and expenditure in altering and adapting a large house, has provided two or three decent and separate homes where only one existed before, it seems reasonable that he should be allowed to get what rent he can for the new dwelling houses thus created. But, if, with little or no preparation, by mere separate letting, he houses two or three families in a

1. L.R. (1922) 1 K.B. 222.
2. L.R. (1922) 1 K.B. 393.
3. L.R. (1923) 1 K.B. 245.

building designed to accommodate one, it is clear that the Act would be defeated if he could claim to base the standard rents on the actual rents thus obtained."

In all these cases, the question arose whether the landlord, by such alterings or reconstruction, was evading the standard rent as fixed by the Government. If the building is a newly constructed one, the tenant cannot insist on payment of the standard rent.

In *Stockham* v. *Easton*[1], the owner of a house made substantial structural alterations to his building which rendered it suitable for occupation as separate parts and in consequence of these alterations the identity of the house as a whole was destroyed. The tenants insisted on payment of the standard rent but the landlord insisted that he was entitled to claim his own rent : The Bench held :

"In this case the landlord has reconstructed the house as a whole, making it available for several tenants, and has effected great improvements in it, even indirectly upon the first floor, and if we were to hold that notwithstanding the benefits which this floor has derived from the improvements in the house he is still bound by the proportion of the old rent which this floor bore, it would tend very much to discourage a landlord from undertaking work of this kind. To hold that a landlord who has spent a large sum on reconstruction must be left to get his remuneration from the particular floor or floors that he has structurally altered and is not allowed to get it also from a floor which has derived benefit from the alterations, merely because the alterations in that floor itself are trifling, would, I think, deter landlords from effecting such improvements, and so far from furthering the policy of the Act would really hamper it."

Now, in *Chapsi* v. *Keshavji*[2], the whole building was practically re-walled, re-floored and re-roofed, and a new chowk to bring in more light and air was made. Free ventilation had been provided and access to the street had been given. Most of the old beams and joists were removed and new ones put in, and one could fairly say that there was a new building. It was held that the building was a new building. In *Ibrahim* v. *Jan Mahomed*,[3] where a landlord entirely reconstructed a wall which had fallen down and made extensive structural alterations in the house at considerable cost it was held that the identity of the premises had changed. In *Gopalji* v. *Devji*[4], it was held that when a whole building had been remodelled and modernized and provided with better amenities, the reconstruction amounted practically to a rebuilding of the whole house.

The principle, therefore, seems to be that there must be such alterations in the premises by reason of the reconstruction or structural alterations that the original premises must lose its identity. On a review of the case-law and the facts of this case, I am inclined to agree with the Principal Judge of the City Civil Court that there is a change in the identity of the premises and that the tenants are not entitled to claim back the portions occupied by them previous to the reconstruction.

Further, the tenants filed the suits for an injunction restraining the landlord from letting or agreeing to let any portions set out in the plaint schedule to any tenant contrary to their rights. They based their rights on the order of the Home Department dated 9th November, 1955. They filed the present suits for injunction in the year 1957. The question is whether they will be entitled to come to Court seeking an injunction after a delay of about two years. Fry, in his book on Specific Performance of Constructs (sixth edition) observes at page 515 paragraph 1102:.

"'A party cannot call upon a Court of Equity for, specific performance', said Lord Alavanley M. R., 'unless he has shown himself ready, desirous, prompt and eager'; or, to use the words of Lord Cranwath, 'specific performance is relief which this Court will not give, unless in cases where the parties seeking it come promptly, and as soon as the nature of the case will permit."

Here, the tenants did not co-operate with the landlord in giving him possession of the portions promptly, that is, as soon as the order was passed by the Government. They questioned, on the other hand, the propriety of the order passed by the Government, by iniciating writ proceedings in this Court. They use all sorts of obstructive tactics and prevented the landlord from carrying out the reconstruction of the building. They also put the landlord into considerable expenses by postponing the construction of the building. Their conduct does not deserve any sympathy, to enable them to get any equitable relief. The delay, which is due to

1. L.R. (1924) 1 K.B. 52.
2. 23 Bom.L.R. 133.
3. 29 Bom.L.R. 1439.
4. 31 Bom.L.R. 38.

the tenants only is only itself a sufficient reason for the Court to refuse the relief of injunction. It is not a case where substantial injury would be caused to the tenants, on the other hand, the tenants who are now in occupation other premises would be put to hardship and inconvenience, if they are asked to vacate.

In the result, the Second Appeals are dismissed, but there will be no order as to costs.

These cases having been set down for being mentioned on this day, the Court made the following Order: "No leave".

V.S. *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

The Proprietor, Lenox Photo Mount Manufacturing Company, 169, Ramnad Road, Madurai .. *Petitioner**

v.

E.R. Ramachary, C/o. Madurai District National General, Labour Union, 34, West Chitrai Street, Madurai and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 33-C (2)—Scope—Workman applying for retrenchment compensation and arrears of wages—Management raising plea of discharge of arrears of wages—Retrenchment found against—Labour Court's jurisdiction to direct payment of arrears—"Benefit"—Meaning of—Not confined to non-monetary benefit.

Where a workman approaches the Labour Court under section 33-C (2) of the Industrial Disputes Act for computation of retrenchment compensation and arrears of wages and the Labour Court finds that his was not a case of retrenchment, the Labour Court would be competent to make a direction for payment of the arrears if found due after considering the plea of discharge of the arrears of wages raised by the management. The right or claim to the arrears, which the workman asked the Labour Court to compute, would necessarily depend on a decision whether the plea of discharge of the arrears was well founded. Section 33-C (2) is wide enough to enable the Labour Court to decide the plea of discharge as a jurisdictional question.

The word "benefit" in section 33-C (2) is not confined to non-monetary benefit which is required to be converted into terms of money. It would include also benefits, expressed or otherwise, in terms of money but required computation. The word computed is not to be understood only as involving a complex process of arithmetic or calculation. If, for instance, a workman claims salary at a particular rate per month and on that basis makes a claim for arrears of salary, there is no reason why it is not a benefit which can be computed in terms of money. The word computed merely means calculation, whether simple or otherwise.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records in 33-C (2) petition No. 156 of 1961, on the file of the Labour Court, Madurai, the 1st Respondent herein and quash the order, dated 11th October, 1961, and made therein.

A. Sundaram, for Petitioner.

B. Lakshminarayana Reddi, for Respondent.

When in the Writ Petition first came on for hearing before him the following Order was made by

Veeraswami, J.:—The question that arises in this case is, whether, where a workman approached the Labour Court under section 33-C (2) of the Industrial Disputes Act for computation of retrenchment compensation and arrears of wages and the Labour Court found that this was not a case of retrenchment, the Labour Court would be competent to go into the question of arrears of wages and make a direction for payment of the arrears if found to be due. This precise question does not appear to have been decided either in *Central Bank of India* v. *Rajagopalan*, (1964) 2 S.C.J. 170: (1964) 3 S.C.R. 140 or in *Daniel Dorairaj* v. *B. & C. Co.*, (1964) 1 L.L.J. 207. In both these cases, sub-section (2) of

* Writ Petition No. 444 of 1962. 17th December, 1964.

section 33-C has been viewed to be wider than the ambit of sub-section (1) of that section. But the question is whether the ambit of sub-section (2) is so wide as to cover a case of a workman who claims arrears of salary and wants the Labour Court to compute quantum of arrears and make a direction for payment. The question is an important one, and I think it desirable that it is decided by a Division Bench.

The Petition then came on for hearing in pursuance of the above order before a Division Bench (*Veeraswami* and *Kunhamad Kutti, JJ.*).

A. Sundaram, for Petitioner.

B. Lakshminarayana Reddi, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This petition is to quash an order of the Labour Court, Madurai, made on an application filed by the Respondent under section 33-C (2) of the Industrial Disputes Act, 1947, for computation of retrenchment benefits and arrears of salary. The respondent claimed a total sum of Rs. 637.50 comprised of notice pay at Rs. 85, retrenchment compensation at Rs. 127.50 and arrears of salary at Rs. 425 for the period from 1st February, 1961 to 30th June, 1961. The petitioner contended that the respondent had voluntarily stopped from service and that therefore he would not be entitled to retrenchment compensation. The Labour Court found this point in favour of the petitioner. But as regards the arrears of the salary, the Labour Court found that the respondent would be entitled to arrears for the period from 1st February, 1961 to 5th June, 1961, and that the petitioner was also entitled to a deduction of Rs. 30 from the arrears of salary for that period. On that basis, the Labour Court directed the petitioner to pay a sum of Rs. 321.33.

The ground on which the petitioner impugns the order of the Labour Court is that it had no jurisdiction to make it. The argument is that the petitioner having raised a plea of discharge of the arrears of salary and thus disputed the claim thereto, the determination of this question would be outside the purview of section 33-C. It is also said that a claim like arrears of salary which does not call for computation in terms of money value, will not be within the purview of section 33-C (2). On the first point, the Labour Court, as a matter of fact, found that the plea of discharge was not established. No ground has been taken in the Writ Petition against this finding. We should therefore proceed on the basis that the petitioner was in arrears of salary which the Labour Court has ordered payment of. Alternatively, in our view, section 33-C (2) is also wide enough to enable the Labour Court to decide the plea of discharge as a jurisdictional question. It is well-settled that where the jurisdiction of a Court is questioned, that Court will be competent to decide that question and for that purpose also to determine the relative facts bearing on the question.

No doubt, one of us in *Management of Lakshmi Mills* v. *Presiding Officer*[1], took the view that the scope of sub-section (2) of section 33-C was co-extensive with that of section 33 (1). But that view can no longer prevail in view of *Central Bank of India* v. *Rajagopalan*[2]. In that case, the Supreme Court, on a consideration of the scope of section 33-C, expressed the view that sub-section (2) of that section takes within its purview cases of workmen who claimed that the benefit to which they are entitled should be computed in terms of money, even though the right to the benefit on which their claim is based is disputed by the employers. Learned Counsel for the petitioner contended that in this case it is not the right to arrears of salary that is in dispute, but what is in dispute is whether the arrears claimed by the Respondent had been discharged, and this question was not competent for the Labour Court to decide. We are unable to accept this contention. The right or claim to the arrears which the respondent asked the Labour Court to compute, would necessarily depend on a decision whether the plea of discharge was well founded, and, in order to decide the application of the respondent, it was, as an incidental

1. (1963) 2 M.L.J. 184.   2. (1964) 2 S.C.J. 176 : (1964) 3 S.C.R. 140.

question, necessary to decide it. We hold therefore that the Labour Court acted within its jurisdiction in deciding the question relating to the plea of discharge of the arrears.

On the other question, the contention for the petitioner is that the word 'benefit' in section 33-C (2) should be confined to non-monetary benefit which is required to be converted into terms of money. It is true that this specific question was not expressly decided by *Central Bank of India* v. *Rajagopalan*[1]. In fact, as we find from the judgment, no dispute in that regard was raised before the Supreme Court. But it may be seen from the facts of that case, the claim on behalf on the workmen was to extra remuneration for additional work done and it was the additional remuneration for additional work done that the workman asked to be computed in terms of money. It was therefore not a case of non-monetary benefit. Apart from that, in our view, there is no reason to limit the scope of the word 'benefit' in section 33-C (2). If sub-section (2) is, as has been held by the Supreme Court, of a wider scope than sub-section (1) of section 33-C, the words, "benefit" as it seems to us, would include also benefits, expressed or otherwise, in terms of money but required computation. The word 'computed' is not to be understood only as involving a complex process of arithmetic or calculation. If, for instance, a workman claims salary at a particlar rate per month and on that basis makes a claim for arrears of salary, we do not see why it is not a benefit which can be computed in terms of money. The word 'computed' merely means, as we think, calculation, whether simple or otherwise.

The petition is dismissed with costs. Counsels fee Rs. 100.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

A. L. Balakrishna Iyer .. *Petitioner**

v.

K. M. Subramania Asari .. *Respondent.*

Limitation Act (IX of 1908), section 19—Acknowledgment of liability—What constitutes.

The plaintiff placed an order for making some wooden articles valued at Rs. 172 paying Rs. 95 as advance. When the articles were delivered the plaintiff expressed dissatisfaction that they were not according to his taste and returned them to the defendant. On 16th December, 1957, the defendant took the balance of Rs. 77 from the plaintiff and agreed to pay back the entire amount after selling the articles. The plaintiff called upon the defendant to pay the amount due to him from time to time for which he got a reply from the defendant dated 1st April, 1958, stating that the amount was not paid as the articles were not yet sold and that there was no time-limit for it. He also stated that he was willing to deliver the articles to the plaintiff. The plaintiff thereafter brought a suit against the defendant after three years of the date on which the cause of action arose *viz.*, 16th December, 1957, for the recovery of the amount due to him. The respondent resisted the suit pleading limitation :

Held, by his letter dated 1st April, 1958, the defendant acknowledged his liability to pay the amount due to the plaintiff and the suit was not therefore barred by limitation.

Petition under section 25 of Act IX of 1887 praying the High Court to revise, the decree of the Court of the District Munsif of Kumbakonam dated 4th August, 1961, and made in S.C. Suit No. 222 of 1961.

K. Sarvabhuman, for *K. N. Srinivasan*, for Petitioner.

R. Chellappa for *P. S. Sarangapani Ayyangar*, for Respondent.

The Court made the following

ORDER :—This Revision Petition arises out of a suit filed by the petitioner herein for recovery of a sum of Rs. 184.50 as damages.

The respondent is a carpenter. The petitioner placed an order for making some wooden articles in October, 1957, valued at Rs. 172. At the time of the order,

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1. (1964) 2 S.C.J. 176 : (1964) 3 S.C.R. 140.

* C.R.P. No. 357 of 1962. 18th December, 1964.

the petitioner advanced Rs. 95. It was understood that the finished articles should be delivered on 9th December, 1957. But the respondent delivered the articles only on 16th December, 1957. The petitioner expressed dis-satisfaction that the articles were not in accordance with his taste, and he returned the articles to the carpenter. The respondent agreed to sell the articles and took the balance of Rs.77. He also agreed to pay back the amount, after deducting Rs. 15 towards labour charges. The respondent also executed Exhibit A-1 dated 16th December, 1957, which is in the following terms :

> "Since you say that you do not require the soap set *vagaira* goods, for which you had placed an order, I shall dispose of the finished goods in the neighbourhood and I shall bring and pay you Rs. 95 which I have received till this day, and Rs. 77 received this day, in all for the two items totalling Rs. 172 less Rs. 15 which I shall take for me the balance payable being Rs. 157."

The petitioner called upon the respondent to pay the balance of Rs. 157 from time to time. The respondent sent a reply through the Counsel, Exhibit A-2 dated 1st April, 1958, wherein he stated :

> "But as they (articles) were not yet sold, the amount was not paid. There is no time-limit for it. Even now your client is often visiting this place and is seeing them. The articles are also there. My client agrees to your client taking them."

Subsequently, the petitioner filed the present suit, out of which this revision petition arises, for recovery of the amount and also interest. The respondent resisted the suit and pleaded limitation. After hearing arguments on the question of limitation, the learned District Munsif held that the suit was barred by limitation, inasmuch as the plaint was presented after three years of the date on which the cause of action arose, *viz.*, 16th December, 1957. The plaintiff has filed the present revision against the dismissal of his suit.

The question for consideration in this revision petition is whether the suit is barred by limitation. A reading of Exhibit A-2 clearly shows that the respondent acknowledged his liability to pay the amount due and payable by him as found in Exhibit A-1. In his letter, Exhibit A-2, the respondent has stated that he is willing to deliver the articles to the petitioner. He has also stated that there is no time-limit for payment of the amount due. In the circumstances, the learned District Munsif was not right in coming to the conclusion that the suit was barred by limitation.

Learned Counsel for the petitioner cited three cases in support of his argument. In *Sivakasi Match Exporting Co.* v. *R. Mohanlal Brothers*[1], a Bench of this Court has observed :

> "The defendant expressly acknowledges the fact of the payment of advance and of the failure of performance of the contract, and also impliedly acknowledges his liability to refund that amount; but he only says that he has adjusted it as against the claim for damages for the breach of contract ....Such a statement can constitute an acknowledgment within the meaning of section 19 of the Limitation Act."

In *Ramaswami* v. *Velayuthan*[2], it has been observed :

> "Where a mortgagor executing a sale deed in favour of the mortgagee, states therein that a certain sum is due from him to the mortgagee on settlement of accounts, and that he is attempting to discharge that debt by sale of certain property under the sale deed, and that for the balance he is making provision for its discharge by execution of other documents, such a statement amounts to an admission of subsisting liability on the date of the sale deed as required by law so as to constitute an acknowledgment."

In *Kuppuswami Aiyar* v. *Sabapathy Pathan*[3], the plaintiff, in a suit for sale on a mortgage, relied upon a reply notice sent by the mortgagors, in answer to a demand for payment made by the mortgagee, as saving limitation. The notice stated that the mortgagors had usufructuarily mortgaged the lands to a third person and had therein directed him to pay the suit mortgage amount and therefore it was very wrong on the part of the mortgagee to make a demand upon them for the payment of the mortgage amount without receiving the same from the above-mentioned usufructuary mortgagee and that they would not be liable for any costs or damages

1. (1963) 1 M.L.J. 382.
2. (1938) 1 M.L.J. 450.
3. (1937) 2 M.L.J. 24.

since they had so directed payment. It was held that the letter in reply to the demand was sufficient acknowledgment within the meaning of section 19 of the Limitation Act.

Relying on these authorities, I hold that the suit is not barred by limitation. However, as the respondent has expressed his readiness and willingness to return the articles to the petitioner herein, I remand the suit to the lower Court and also direct the learned District Munsif to exercise his discretion whether it is worthwhile to return the artilces to the petitioner. If he thinks that the articles are not in good condition, he will pass a decree in favour of the petitioner herein as prayed for in his plaint.

This revision is ordered accordingly. There will be no order as to costs.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Sri Varadarajaswami Transports (P.), Ltd. .. *Petitioner**

v.

The Regional Provident Fund Commissioner, Madras and another .. *Respondents.*

Employees Provident Fund Act (XIX of 1952), section 16 (a)—Exemption under—Scope of—' Date on which the establishment is or has been set up'—Meaning of.

The word ' establishment ' has not been defined in the Employees Provident Fund Act, though the word has been used in several of its provisions. An establishment should therefore be given its ordinary meaning of an organisation which employs persons between whom and the establishment the relationship of employer and employee comes to exist. It may be that an incorporated company may be a juristic entity different from the persons who are members thereof. But that cannot affect the question whether an ' establishment ' has been in existence for the specified period for purpose of the Employees Provident Fund Act. Where an establishment came into existence a number of years ago, the fact that the owner converted it into a company later does not make any difference to the date on which the establishment has been set up. The introduction of an incorporate personality does not have any effect upon the continued existence of the establishment for purposes of the Act and no exemption could be claimed under section 16 of the Act on the ground that four years have not elapsed since its incorporation.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 1st respondent herein to forbear from enforcing the Employees Provident Fund Act and the scheme therein against the petitioner in pursuance of the notice dated 18th January, 1963, No. D/MD/1856/Regl.

R. Sundaravaradan, for Petitioner.

K. S. Bakthavatsalam, for the Additional Government Pleader, on behalf of Respondents.

The Court made the following

ORDER.—The petitioner company was incorporated on 10th May, 1960. It appears to consist of only two members, the Managing Director and his wife, who are the sole proprietors of the concern. Prior to the formation of the company, the Managing Director was the individual owner of the bus concern. The Regional Provident Fund Commissioner issued a notice dated 17th September, 1962, demanding certain payments under the Provident Fund Scheme framed under the Employees Provident Fund Act. The petitioner company contended that it came into existence only on 10th May, 1960, and was entitled under section 16 of the Employees Provident Fund Act to exemption from the provisions of the law for a period of five years. This contention of the petitioner company was not accepted. Since penal action for failure to comply with the requirements of the notice was threatened, the pettioner has approached this Court for the issue of a writ of *mandamus* to forbear the respondent, the Regional Provident Fund Commissioner from enforcing the Act and the Scheme against the petitioner.

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* Writ Petition No. 129 of 1963. 18th December, 1964.

In the counter-affidavit filed on behalf of the Department it is stated that road transport concerns were brought within the ambit of the Act by a notification effective from 1st August, 1961. It is contended by the Department that the establishment in question had been in existence from 1932 onwards and that its incorporation as a company cannot entitle it to say that it is a new establishment to which the benefits of section 16 are available. The establishment having been in existence for more than five years already, the respondent acted within his jurisdiction in demanding that the petitioner company should comply with the requirements of the scheme. It is accordingly claimed that the petition is devoid of substance and should be dismissed. The qeustion lies within a very narrow compass. It is whether in these circumstances the petitioner is entitled to the protection of section 16 of the Employees Provident Fund Act.

Section 16 reads :

"This Act shall not apply—

(*a*) to any establishment registered under the Co-operative Societies Act, 1912, or under any other law for the time being in force in any State relating to co-operative societies, employing less than 50 persons and working without the aid of power ;

(*b*) to any other establishment employing 50 or more persons or 20 or more but less than 50 persons, until the expiry of three years in the case of the former and five years in the case of the latter, from the date on which the establishment is or has been set up."

We are not concerned with sub-clause (*a*). Though Mr. Sundaravaradan, learned Counsel for the petitioner raised some question with regard to the number of persons employed, it was not in dispute that the petitioner company did employ more than 20 but less than 50 persons after the date of the incorporation. The question then is whether the expression " the date on which the establishment is or has been set up" means the date on which the company was incorporated.

The word " establishment " has not been defined in the Act, though that word has been used in several provisions of the Act, as also in other terms which have been defined in the definition section. An " establishment" therefore must be given its ordinary meaning and it means an organisation which employs persons between whom and the establishment the relationship of employee and employer comes to exist. That broad definition will suffice for the purpose of this case. Mr. Sundaravaradan contends that an incorporation brings a new entity into existence and that therefore the old entity has altogether ceased to exist, and in support of this argument he has cited *Salomon* v. *Salomon & Company*[1], a decision of the House of Lords. It is unnecessary to refer to any portions of the judgment, for there is no disputing the position that the company is a juristic entity different from the persons who are members thereof. But that has no bearing whatsoever upon the question whether the establishment which existed previously and which was converted into a company puts an end to the establishment and brings a new establishment into existence. It is also argued by the learned Counsel that it was only by a notification issued by the Government that these transport undertakings came within the scope of the Act and it is that date which is relevant for the purpose of computing the period of protection which section 16 provides for. I am unable to agree with this view either. By section 1 (3) of the Act, it is open to the Central Government to bring within the scope of the Act any establishment (other than a factory engaged in any industry specified in Schedule 1) employing 20 or more persons. By virtue of a notification issued, such establishments like those of the petitioner have been brought within the scope of the Act, but section 16 has no relevance to the date on which such notification has been issued. It computes the period of the protection of three or five years, as the case may be, not from the date on which any establishment is brought within the scope of the Act by virtue of a notification, but from the date on which " establishment is or has been set up ". The introduction of an incorporate personality in 1960 does not, therefore, have any effect upon the continued existence of the establishment. It seems to me that since there is no doubt that the establishment was originally set up in 1932, the mere fact that the owner formed a company in 1960 makes no difference to the date on which the establishment has been set up.

1. L.R. (1897) A. C. 22.

A similar question was considered by me in a batch of writ petitions *Devi Press* v. *The Regional Provident Fund Commissioner*[1], and in somewhat analogous circumstances and the contention that a new establishment had come into existence was rejected. In another case also decided by me *Sahni & Co.* v. *Union of India*[2], the case arose where the owner of an establishment, a cinema theatre, did not run it himself but leased it out from time to time, and one of such lessees, the petitioner, contended that he was entitled to the benefit of section 16 from the date on which he took over the lease. That contention was rejected by me in the view that the date on which the establishment had been set up could not be interpreted by reference to any leases that might have been granted from time to time.

I am accordingly of the opinion that the claim to the protection of section 16 of the Act is devoid of substance. The petition fails and is dismissed. There will be no order as to costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Kasturi Bai and another .. *Petitioner**

v.

Sengoda Goundar and others .. *Respondents.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 3 (3) (a) (b) and Madras Cultivating Tenants (Payment of Fair Rent) Act (XXIV of 1956), section 4 (1), Explanation—*Tenant depositing the value of paddy fixed as fair rent but not the value of the straw or stalk to which the landlord is entitled to—If valid deposit.*

It is no doubt true that a tenant invoking the aid of section 3 (*a*) of the Madras Cultivating Tenants' Protection Act has to deposit the full value of the rent due by him. But the mere fact that there is a deficiency in the amount deposited will not invalidate the deposit irrespective of all other circumstances. Where the tenant was labouring under a *bona fide* doubt as to what he should do with regard to the landlord's share of the straw under the *Explanation* to section 4 (1) of the Payment of Fair Rent Act, it is open to the Rent Court to decide the question and give time to the tenant to make up the deficiency. This will be all the more so where the Fair Rent Court has not fixed the value of the landlord's share of the straw or stalk.

Petitions under section 6-B of the Madras Act XXV of 1955 and section 115 of Act V of 1908 praying the High Court to revise the Orders of the Court of the Revenue Divisional Officer, Namakkal, dated 26th September, 1961, and made in C.T.P.A. Nos. 20, 18 and 19 of 1961 respectively (C.T.P. Nos. 8, 9 and 7 of 1959 on the file of the Rent Court, Tiruchengode, Salem District).

R. Ragunathan, for Petitioner.

T. K. Subba Rao, for Respondents.

The Court made the following

ORDER.—The landlady is the petitioner in these revision petitions. The short point that arises for determination is whether the deposit made by the cultivating tenants under section 3 (3) (*a*) of the Madras Cultivating Tenants' Protection Act of 1955 is sufficient compliance with the provisions of the Act, as the tenants deposited only the value of the paddy (of the petitioner's share) of the rent and not the value of the landlady's share of the stalk or straw.

In all these cases the landlady filed applications for fixation of fair rent under the Payment of Fair Rent Act of 1956 and the authority concerned had fixed the fair rent (paddy) but in that order there was no reference to the one-fifth share of the stalk or straw of all the crops, to which the landlady would be entitled under *Explanation* to section 4 of the Payment of Fair Rent Act of 1956. The Rent Court accepted the deposits made by the tenants and declined to express any opinion about the value of the landlady's share of straw or stalk on the ground that it was not within his jurisdiction to decide that question.

1. W.P. No. 225 and 226 of 1962. 2. (1964) 2 M.L.J. 191.

*C.R.P. Nos. 857, 858 and 861 of 1962. 20th December, 1964.

Learned Counsel for the petitioner (landlady) contended that the Rent Court ought to have dismissed the petitions filed by the tenants under section 3 (3) (*a*) when once it was found that the tenants had not deposited the value of the landlady's share of paddy along with the landlady's share of stalk or straw. He urged that the fact that under the Fair Rent Act the fair rent was fixed with reference to the paddy and no mention was made about straw does not absolve the liability of the tenants to deposit its value if the tenants chose to invoke the provisions of section 3 (3) (*a*) of the Cultivating Tenants' Protection Act. In substance his argument is that so long as the deposit made by the tenants does not comprise the entirety of the rent due by the tenants in cash, the petition was liable to be dismissed. I do not agree that, that should be the result in every case where there is a deficiency in the amount deposited irrespective of all other circumstances. The facts of the case disclose that the tenants were labouring under a *bona fide* doubt as to what they should do in regard to the value of the landlady's share of straw since the Fair Rent Court had not determined its value. So long as its value had not been determined by the Fair Rent Court, it would be open to the Revenue Divisional Officer under section 3 (3) (*b*) to determine the value of the straw for the purposes of a proceeding under the Tenants' Protection Act and give some time to the tenants to pay the same. In my opinion, whenever the fair rent had not been fixed under the Fair Rent Act, whether in respect of paddy or straw, or of both, if the tenant files an application under section 3 (3) (*a*) of the Cultivating Tenants' Protection Act the Rent Court for the purpose of that proceeding will have undoubted jurisdiction to decide the quantum of rent under section 3 (3) (*b*) and if there is any deficiency on account of a *bona fide* genuine doubt, or for any other sufficient reason the Rent Court shall allow the cultivating tenant some time to make up the deficiency. The Rent Court should not have declined to decide the value of the landlady's share of straw.

The result therefore is that these petitions are remitted back to the Rent Court for fixing the value of the landlady's share of straw and direct the tenants to pay the same within a reasonable time.

R.M. ——— *Petitions remitted.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Smt. Nafisa Zahara Begum .. *Petitioner**

v.

The Corporation of Madras, Madras .. *Respondents.*

Madras City Municipal Act (IV of 1919), section 137-B and Schedule IV, Part I-A, rule 3—Relative scope and effect of—Power of Corporation to demand enhanced tax before amendment of assessment books—Notice of proposed enhancement and notice calling upon assessee to pay enhanced tax in advance before hearing objections and amending assessment books—Legality—Constitution of India (1950), Article 226—Other remedy open—Issue of writ—Discretion of High Court to issue.

Section 137-B of the Madras City Municipal Act confers a power on the appropriate authority to assess in a case of escape from assessment. It enables the authority, notwithstanding anything to the contrary contained in the Act or the Rules ; if any person has been assessed in any half-year or year at a lower rate than the rate at which he is assessable, to serve on such person a notice assessing him to the tax at any time within three years from the date on which such person should have been assessed. Schedule IV, Part I-A to the Act provides for the assessment of property tax ; rule 3 enables the Commissioner after giving notice to the assessee and hearing his objections, to amend the Property Tax Assessment Books at any time between one general revision and another and under the Rules such amendment has to be deemed to have taken effect on the first day of the half-year in which it is made.

Once the Rules are applied and the amendment is made, the owner (assessee) has the right to move the Commissioner to reduce the tax by a revision petition. The Rules insist on a personal hearing being given to the owner, but section 137-B contains no such specific provision. Even so, unless the assessment upon the owner is revised in a manner known to law (*i.e.*, after hearing the owner, as provided in the Rules, the Commissioner cannot issue a demand for recovery of any amount over and above what is found recorded in the assessment books.

* Writ Petition No. 143 of 1963. 31st December, 1964.

The principles of natural justice require that before an enhanced liability can be fastened on a tax-payer, the latter should be given an opportunity of being heard. Section 137-B merely enables the Commissioner to validate recovery of tax for earlier years once it is found that the property has been under-assessed. The rules in Schedule IV, Part I-A are *ex facie* prospective in their application, and only to the extent of enabling recovery for the previous years that section 137-B has been expressly enacted. But it does not and cannot mean that without any inquiry of any sort and without giving an opportunity to the assessee to state his case against enhancement of the tax, the Commissioner can straightaway proceed to issue a demand under section 137-B.

When the notice of the intended amendment of the Assessment Books calling upon the assessee to state his objections to the proposed assessment on a specified date under rule 3 of Part I-A of Schedule IV, and the notice of demand under section 137-B, calling for the payment of the enhanced tax for the half-year are issued on the same day, and the assessee is called on to pay the said tax within a specified period and informed that in default steps would be taken to realise the amount, the notice under section 137-B is illegal and arbitrary and liable to be quashed under Article 226 of the Constitution.

In such a case, where the demand notice is issued in advance of the amendment of the Property Tax Assessment Books threatening coersive proceedings against the assessee, a writ should properly issue to quash the notice notwithstanding that the assessee might have other remedies under the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records of the respondent in respect of Premises No. 1/33 Mount Road, Division 69, Madras and quash the notice dated 2nd February, 1963, issued by the respondent under section 137-B of the Madras City Municipal Act.

Habibullah Badhsa and *Ghouse Alikhan*, for Petitioner.

T. Chengalvarayon, for Respondent.

The Court made the following

ORDER.—This is an application under Article 226 for the issue of a writ of *certiorari* to quash a notice issued by the respondent, the Corporation of Madras, under section 137-B of the Madras City Municipal Act, 1919.

In respect of certain premises, the petitioner was paying a property tax of Rs. 322-21 nP. upto the second half-year of 1960-61. On 2nd February, 1963, the respondent issued a notice under section 137-B of the Madras City Municipal Act demanding a sum of Rs. 2,730 as for tax and a further sum of Rs. 68-25, bringing a total of Rs. 2,798-25 for the first half year of 1962-63. It was also stated therein that the annual value of premises, which was previously Rs. 2,730 had been increased Rs. 21,840 and this notice stated that in the exercise of the powers under section 137-B, the sum demanded was treated as a sum due on an escaped assessment, and the petitioner was called upon to pay the amount within 15 days from the date of the service of the notice. She was also informed that if the amount was not paid, steps for realisation would be taken. The petitioner complains that no reasonable opportunity was given and that the Revenue Officer had already decided without hearing objections to increase the property tax. It is alleged that the notice and demands are contrary to law, that the principles of natural justice have been violated and that in fact the Revenue Officer has exceeded his jurisdiction.

On behalf of the respondent, a counter-affidavit has been filed. It is stated that the demand of the tax made on the petitioner is based on the rental income, which is Rs. 2,000 per month as reported by the assessor. It is claimed that notices under section 137-B and Rule 3, Part I (*a*) of Schedule IV of the Madras City Municipal Act have been issued informing the petitioner that the Corporation proposed to alter the annual valuation. The petitioner was also informed that a personal hearing would be held on 8th February, 1963. It is however not denied in this counter-affidavit that along with the notice fixing the personal hearing a further notice under section 137-B demanding payment of the enhanced tax was also served. It is claimed that opportunity had been given to the petitioner and that there could be no complaint in that regard.

It is not in dispute that two notices were issued to the petitioner. The first one is under Rule 3, Part I-A of Schedule IV of the Madras City Municipal Corporation Act, and it stated thus :

> " Please take notice that the Property Tax Assessment Books will be amended by altering the annual value of the property and the amount of the property tax payable thereon from the valuation of Rs. 2,730 and tax of Rs. 341-25 plus library cess Rs. 8-53 to the valuation of Rs. 21,840 and tax of Rs. 2,730 plus library cess Rs. 68-25 in respect of buildings and lands described hereunder. Your objection, if any, to such amendment will be heard by me at my office in the Ripon Buildings on 8th February, 1963 at 3 P.M."

The notice under section 137-B made a demand calling for the payment of tax of Rs. 2,798-25 for the first half-year of 1962-63. Both of these notices appear to have been issued on the same day, that is, 2nd Februaryr, 1963. Turning to section 137-B of the Act, it is seen to confer a power on the appropriate authority to assess in a case of escape from assessment. It enables the authority, notwithstanding anything to the contrary contained in the Act or the Rules, if any person has been assessed in any half-year or year at a lower rate than the rate at which he is assessable, to serve on such person a notice assessing him to the tax due at any time within three years from the date on which such person should have been assessed. Schedule IV, Part I-A, provides for assessment of property tax. Rule 3 enables the Commissioner after giving notice to the parties concerned and hearing their objections, to amend the Property Tax Assessment Books at any time between one general revision and another. It also states that such amendment shall be deemed to have taken effect on the first day of the half-year in which it is made. If the rules are applied and the amendment is made, the owner has the right to move the Commissioner by revision petition to reduce the tax. While the rules insist upon a personal hearing being given to the owner, section 137-B contains no such direction in specific terms. But it seems to be undeniable that unless the assessment upon the owner is revised in any manner known to law, the Commissioner cannot issue a demand for recovery of any amount over and above what is found recorded in the Assessment Books. It is elementary that principles of natural justice require that before an enhanced liability can be fastened upon a tax-payer, he should be given an opportunity of being heard. Despite the fact that section 137-B starts with the words " notwithstanding anything to the contrary contained in this Act or the Rules framed thereunder", I am unable to agree that the demand could have been made upon the petitioner without hearing her in that regard. What section 137-B enables the Commissioner to do is only to validate recovery of tax *for earlier years* when once it has been found that the property has been under-assessed. The rules contained in Part I-A of Schedule IV are *ex facie* prospective in their application. It is only to the extent of enabling the recovery for the previous three years that section 137-B has been expressly enacted. It does not mean that without any enquiry of any description and without giving an opportunity to the tax-payer to state his case against the enhancement of the tax, the Commissioner can straightway proceed to issue a demand under section 137-B. An amendment of the Property Tax Assessment Books effected by rule 3 of Part I-A of Schedule IV clearly takes effect on the first day of the half-year in which it is made. It is this limitation that is relaxed; that the Commissioner can issue a notice demanding tax at an enhanced figure under section 137-B without reference to the rules contained in the Schedule is to my mind wholly erroneous.

Mr. Chengalvarayan, learned Counsel for the Corporation, urged that the petitioner has other appropriate remedies under the Act and that the discretionary juridiction of this Court in writ should not be exercised in his favour. I would have been willing to accept this contention had the proceedings of the Commissioner been confined only to the rules contained in Schedule IV. But, on the other hand, the Commissioner has purported to exercise the power under section 137-B and to issue a demand even in advance of the amendment of the Property Tax Assessment Books and threatened coercive proceedings against the tax-payer. It seems to me that this is a proper case where the writ should issue.

The notice issued under section 137-B is accordingly quashed. It would be open to the Commissioner to issue a fresh notice under the rules, amend the property tax books after giving notice to the petitioner to make her representations and thereafter invoke, if so advised, the powers under section 137-B for the realisation of tax. In the circumstances, there will be no order as to costs.

P.R.N. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

Rudrappa Chetty .. *Petitioner**

v.

Narasimha Chetty and another .. *Respondents.*

Civil Procedure Code (V of 1908), Order 1, Rule 10 and Order 8-A—Third party proceedings—Suit by assignee-mortgagee against mortgagor—Plea of discharge before assignment made by mortgagor—Receipt evidencing payment—Application to add original mortgagee as party defendant—Genuineness of receipt assailed—Original mortgagee to be impleaded—Liability to indemnity.

Where in a suit by the assignee-mortgagee the defence was that the mortgagor-defendant had discharged the debt by payment to the original mortgagee (assignor) prior to the date of assignment ; in the interests of justice the original mortgagee can be impleaded as a party defendant under Order 8-A, rule 1 and Order 1, rule 10. Civil Procedure Code Any later suit that might have to be filed by the defendant against the original mortgagee, in case the present suit by the assignee succeeds, might well be brought within the scope of an action for indemnity. The expression indemnity has to be interpreted broadly and would mean "claims to indemnity as such either at law or in equity".

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the District Munsif, Ranipet dated 20th January, 1964, and made in I.A. No. 861 of 1963 in O.S. No. 501 of 1962.

S. Vaidyanathan, for Petitioner.

P. Raghaviah and *C. Vasudevan*, for Respondents.

The Court made the following

ORDER.—I consider that, upon the facts of the situation with regard to which this interesting revision proceeding is filed, it is clear that the revision should be allowed both under Order 1, rule 10, Civil Procedure Code, and under Order 8-A, rule 1, Civil Procedure Code. This is upon very broad grounds of equity and the interests of justice, as well as the strict applicability, to the facts, of the provisions that I have just cited. As regards the facts themselves, there is no dispute.

The suit in the Court below was instituted by a plaintiff (here, respondent 2), as an assignee of a mortgage executed by the revision petitioner on 7th November, 1950. The simple defence of the revision petitioner to the action, as party—defendant, was that he (mortgagor) had discharged the debt by payment to the original mortgagee (assignor), so that the debt was totally extinguished thereby, prior to the date of assignment. The revision petitioner relied on a receipt held by him, purporting to have been passed by the assignor, evidencing the discharge of the debt. The revision petitioner frankly conceded that the fact of this payment discharging the debt had not been engrossed on the document of mortgage itself, and the document thereby formally discharged; but he relied on the collateral evidence of this receipt in proof of the discharge.

Under those circumstances, the defendant (revision petitioner) prayed, both under Order 1, rule 10, Civil Procedure Code, and Order 8-A, rule 1, Civil Procedure Code, which is a specific provision in Madras State enabling a Third party procedure to be adopted in such cases, that the assignor and original mortgagee be added as party defendant to suit, as he was a necessary and proper party, and a party against whom the revision petitioner could claim contribution or indemnity. The learned District Munsif thought that these provisions did not apply to the situation and dismissed the petition. I may here add that the proposed party

* C.R.P. No. 682 of 1964. 6th January, 1965.

filed a counter-statement in the proceeding, denying the genuineness of the receipt, precisely as the plaintiff had denied it; both the plaintiff-respondent and the proposed party took up the position that the proposed (assignor) need not be added either under Order 1, rule 10, Civil Procedure Code, or under Order 8-A, rule 1, Civil Procedure Code.

The arguments pressed by learned Counsel for the two respondents against the allowance of this revision proceeding, can be briefly stated. Firstly, it is urged that Order 1, rule 10, Civil Procedure Code, does not apply, because the trial Court was not satisfied that the proposed party was either a necessary party to the suit, or a proper party. It is a power or discretion of the trial Court, and not any right of party; the defendant in the suit cannot invoke Order 1, rule 10, Civil Procedure Code, as a matter of right. Secondly, the argument is that Order 8 (*a*), rule 1, does not apply, as, even in case this suit is decreed, the defendant cannot claim to be entitled to contribution or indemnity from the proposed third party. His claim can only be of the character of an action in damages. The last argument is that Order 34, rule 1, Civil Procedure Code, governs mortgage suits, and that the original mortgagee (assignor) having parted with his interest in the security, is not a proper party to this mortgage suit under Order 34, rule 1, Civil Procedure Code.

The decisions of this Court upon these two related aspects of the situation that has arisen in the suit may be briefly referred to. *Secretary of State* v. *Murugesa*[1], is a decision of Venkatasubbha Rao, J., laying down in general terms, the ambit and significance of Order 1, rule 10, Civil Procedure Code. The learned Judge dissented from a prior decision of this Court which had held that, the Judgment in the suit being *inter partes*, a plaintiff cannot be compelled to implead, as a defendant, a person against whom he sought no relief, by means of an application under Order 1, rule 10, Civil Procedure Code. The learned Judge pointed out the distinction between a necessary party and a proper party, and emphasised that the intention of the Legislature was to avoid mutiplicity of suits, and to ensure that the dispute would be finally determined in the presence of all the parties interested. Even if the plaintiff objected to the joinder of the proposed party, the Court would have the power to direct that the proposed party be brought on record, if the Court considered that this was essential in the interests of justice. The other decision, *Narayana* v. *Gurramma*[2], is of Abdur Rahman, J., and emphasises that the provision, Order 1, rule 10 must be liberally construed, in the interests of justice.

I have carefully considered the arguments of learned Counsel both for the plaintiff and the proposed party, why the Court should not now, in the interests of justice, bring on record in this suit the proposed party, the original mortgagee (assignor), particularly as that would enable a complete adjudication of the controversy in the presence of all parties having an interest. I find these arguments to be singularly unconvincing. As regards Order 8-A, rule 1, Civil Procedure Code, manifestly, it applies to the situation, and this can be easily shown. If we suppose that the suit is decreed, according to the defendant (revision petitioner), on an erroneous rejection of the receipt on which he relies, the revision petitioner will obviously have the remedy of filing a separate suit against the original mortgagee (proposed party), which will be in the nature of a suit for damages, or for enforcing an indemnity of some kind. My attention has been drawn to the decision in *Pattabhiraman* v. *Ganapathi Kannappa Mudali*[3], wherein Ramachandra Iyer, J., (as he then was) has construed the ambit of rule 1 of Order 8-A, Civil Procedure Code. The learned Judge emphasised that the principle of the rule did not depend on the right of the plaintiff to choose parties to his litigation, and was for the protection of the defendant. No doubt, on the facts of that case, the learned Judge held that the possible claim which might arise, would not be of the nature of contribution or indemnity, but would only be of the nature of damages. In the present context, and on the present facts, I think that any later suit that might have to be filed by the defendant against

1. A.I.R. 1929 Mad. 443.
2. (1940) 2 M.L.J. 918 : A.I.R. 1941 Mad. 364.
3. (1962) 1 M.L.J. 246.

the proposed party in case the present suit by the plaintiff (assignee) succeeds, might well be brought within the scope of an action for ' indemnity '. That expression in my view, has to be broadly interpreted ; in *Burrow's Words and Phrases*, page 92, certain dicta of Bowen, L.J., in 34 Chancery Division, page 261, are quoted to the effect that the corresponding third party procedure (Order 16, rule 48, as it then stood of the Supreme Court Rules) when it dealt with claims to indemnity, meant " claims to indemnity as such either at law or in equity ". I do not see how it could be disputed that the present situation is one to which rule 1 of Order 8-A would apply both substantially, and in a formal sense as well. The argument that Order 34, rule 1, Civil Procedure Code, would preclude the joinder, is clearly a very weak one. It cannot be stated dogmatically that the mortgagee-assignor had no interest in the security, though it might be that, on the date of assignment, there was no subsisting interest. In any event, Order 8-A is a separate provision, formulated in the interests of justice, and its applicability is not affected by Order 34, rule 1, provided that the facts of the case warrant the impleading of the proposed third party. As regards the arguments of learned Counsel for the proposed third party, they would appear to amount to a resistance to having the matter of the genuineness of the receipt tested in this very suit itself, by the evidence of the proposed third party, subject to the rights of cross-examination by the party affected adversely by that evidence. In my view, that very situation warrants the inference that it is essential, in the interest of justice, to invoke the procedure under Order 8-A, rule 1, and also that the impleading of the proposed third party is in the substantial interests of justice with regard to the scope of Order 1, rule 10, Civil Procedure Code. Consequently I allow the revision proceeding, and direct the impleading of the proposed third party as party defendant. The trial will then proceed in due course.

There will be no order as to costs.

V.S. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Contempt Jurisdiction.)

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN AND MR. JUSTICE M. NATESAN.

A. Ramalingam .. *Applicant**

v.

V. V. Mahalinga Nadar .. *Respondent.*

Contempt of Courts Act (XXXII of 1952), section 3—Contempt jurisdiction—Exercise of—Principles—Infringement of decretal order of Court—Exercise of contempt jurisdiction—Expediency.

Essentially contempt of Court is a matter which concerns the administration of justice and the dignity and authority of judicial tribunals ; a party can bring to the notice of Court facts constituting what may appear to amount to contempt of Court, for such action as the Court deems it expedient to adopt. But essentially jurisdiction in contempt is not a right of a party to be invoked for the redressal of his grievances ; nor is it a mode by which the rights of a party, adjudicated upon by a tribunal can be enforced against another party. The entire corpus of execution law exists for the enforcement of rights by one party against another which have been the subject-matter of adjudication. Thus where a party has disobeyed a temporary prohibitory injunction decree made by a Court it will be inexpedient and undesirable to initiate proceedings in contempt jurisdiction. The facts themselves may be in controversy whether a deliberate flouting of a judicial order or decree has occurred and it would be in the interests of justice to exercise contempt jurisdiction or to commence to do so only when the facts of the record *ex facie* support such a proceeding ; any detailed enquiry must be left to the Court which has passed the order and which is presumably fully acquainted with the subject-matter of its own decree of temporary prohibitory injunction. Order 39, rule 2 (3) of the Civil Procedure Code, is a far more adequate and satisfactory remedy in such a case.

Contempt jurisdiction should be reserved for what essentially brings the administration of justice into contempt or unduly weakens it as distinguished from a wrong that might be inflicted on a private party by infringing a decretal order of Court.

Application praying that this Court be pleased to commit the respondent, for contempt of Court for disobedience of the order of the lower Court dated 30th

* Contempt Application No. 4 of 1965. 15th February, 1965.

July, 1964, made in C.M.A. No. 23 of 1964, on the file of the Additional Judge, City Civil Court, Madras, and punish the respondent for contempt of Court.

O. Radhakrishnan, for Applicant.

S. Rajagopalan, for Respondent.

The Court made the following

ORDER.—After having heard learned Counsel, and very carefully considered the situation in which we are called upon to exercise our jurisdiction under section 3 of the Contempt of Courts Act XXXII of 1952, we are clearly and definitely of the view that, assuming the facts to be as stated by the petitioner, it would not be expedient in the interests of justice to exercise that jurisdiction here, for more than one reason. We are taking it that there is a temporary prohibitory injunction decree made by the appellate Court, which has been disobeyed by the respondent, in the sense that he has erected certain buildings in infringement of that prohibitory injunction. In such a case, it is obvious that Order 39, rule 2 (3) of the Code of Civil Procedure, provides a clear and adequate remedy; the party aggrieved may bring it to the notice of the Court granting the injunction, that its decree or order has not been respected, and that Court, after due enquiry, may exercise the punitive powers against the person to disobedience, under the terms of that rule.

Learned Counsel for petitioner strenuously contends that the existence of any such alternative remedy to his client, will not take away the contempt jurisdiction of this Court. He has also relied upon a decision of a Bench of the Calcutta High Court in *L. S. Sundar* v. *L. B. Nath Parasad*[1] for the view that breach of an undertaking given to Court by any person in a proceeding, would be misconduct amounting to contempt. Learned Counsel has further cited and relied upon the judgment of Panchapakesa Ayyar, J., in *Chinnabba Chetty* v. *Chengalroya Chetty*[2] for the view that Order 21, rule 32 (5) of the Civil Procedure Code, was intended to cover only mandatory injunctions, and did not apply to prohibitory injunctions at all.

We think it is sufficient to stress the following principles, which will be clearly relevant to a situation of the present kind. Essentially, contempt of Court is a matter which concerns the administration of justice, and the dignity and authority of judicial tribunals; a party can bring to the notice of Court, facts constituting what may appear to amount to contempt of Court, for such action as the Court deems it expedient to adopt. But, essentially, jurisdiction in contempt is not a right of a party, to be invoked for the redressal of his grievances; nor is it a mode by which the rights of a party, adjudicated upon by a tribunal, can be enforced against another party. The entire corpus of execution law exists for the enforcement of rights, by one party against another, which have been the subject-matter of adjudication. In our view, there are sufficient grounds here to show that it will be inexpedient and undesirable to institute proceedings in contempt jurisdiction, in a situation of this kind. Firstly, the facts themselves may be in controversy, whether a deliberate flouting of a judicial order or decree has occurred, and we state this, irrespective of the merits of the instant case. When they are in controversy, they cannot be ascertained without due enquiry. If the Court is to commence an action in contempt jurisdiction, only after ascertaining facts at such an enquiry, obviously it will be converting itself into an agency for arriving at findings of fact which may be a foundation for contempt jurisdiction. On the contrary, it would be in the interests of justice to exercise contempt jurisdiction, or to commence to do so, only when the facts of the record *ex facie* support such a proceeding; any detailed enquiry must be left to the Court which has passed the order, and which is presumbly fully acquainted with the subject-matter of its own decree of temporary prohibitory injunction. For this reason, we are of the view that Order 39, rule 2 (3) of the Civil Procedure Code, is a far more adequate and satisfactory remedy in such cases. Again, where the situation is strictly *inter partes* and third party rights are not involved, it is clearly more desirable that the Court which made the order of injunction, should go into the facts, and ascertain the truth of the alleged disobedience, and the extent to which it has been wilful.

1. (1964) 68 C.W.N. 148.
2. (1949) 2 M.L.J. 705.

As far as the decision in *Chinnabba Chetty* v. *Chengalroya Chetty*[1] is concerned, it is really beside the point here, for the question before us is not whether Order 21, rule 32 (5) of the Civil Procedure Code, provides, or does not provide, an effective mode for the applicant by which to enforce the decree that he has obtained. The Calcutta decision that we have earlier referred to, merely indicates that, under such circumstances, it may not be incorrect for the Court to act in contempt jurisdiction ; even so, everything will obviously depend upon the particular set of facts in the case that is before the Court. Another reason that actuates us is that where the matter is one of infringement of a decree or decretal order embodying rights, as between parties, it is clearly not expedient that contempt jurisdiction should be invoked and exercised, in essence, as a mode of executing that decree, or merely because other remedies may take time, or are more circumlocutory in character.

In a very similar situation, on the facts, in *B. B. Light Railway Company* v. *State of Bihar*[2] a Bench of that Court declined to exercise jurisdiction by the issue of a writ of *mandamus* under Article 226, where a flagrant and wilful disobedience of an agreement was alleged. The Bench pointed out that the alternative legal remedy available to the aggrieved party was no less convenient, beneficial and effectual ; the writ power was discretionary in character, and the party must ordinarily resort to the civil Court of contempt jurisdiction, for necessary reliefs. The principle of this decision applies here, and, on a stronger ground, because contempt jurisdiction should be reserved for what essentially brings the administration of justice into contempt or unduly weakens it, as distinguished from a wrong that might be inflicted on a private party, by infringing a decretal order of Court. The application is dismissed with these observations. The petitioner may pursue such alternative remedies as are available to him in law, as we have pointed out, subject, of course, to all valid defences that may be raised thereto.

V.K. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

T. P. Mohideen ... *Petitioner* *

v.

The State of Madras represented by the Inspector of Police, Crime Branch, Madras, and another ... *Respondents.*

Criminal Procedure Code (V of 1898), section 337—Validity—Provision if unreasonable—If offends Article 14 of the Constitution of India—Grant of pardon to principal offender while abettors are prosecuted—Legality.

The provision for tendering pardon to an accomplice for the purpose of securing " King's evidence " as it is commonly known in English law, has existed for a long time as one of the recognised methods of obtaining evidence in criminal trials, in cases where other methods of obtaining evidence often fail, on the principle that it will be worthwhile to spare one of the several persons concerned in an offence from the consequence of a trial and punishment, if thereby other persons concerned along with him in the offence can be brought to justice. In bringing offenders to justice, there is no question of discrimination or of one offender claiming that he should be treated in the same way as the other, at the stage of investigation. It will be totally unjustifiable to attack section 337 of the Criminal Procedure Code on the ground that that section favours one accused person, who is prepared to turn King's evidence, at the expense of the other accused.

The contention that when there are a number of persons involved in an offence, discrimination within the meaning of Article 14 of the Constitution of India would be involved when one is given pardon under section 337 of the Criminal Procedure Code and the others are prosecuted, involves a misconception of the scope of Article 14. It is not a case of failure to give protection to the accused who are prosecuted. It is a case of refraining from prosecution of one accused for certain reasons enjoined by the statute in the interests of the successful prosecution of certain other persons, and getting the best evidence against them.

An order granting pardon under section 337 of the Criminal Procedure Code cannot be attacked on the ground that the person to whom the pardon has been granted is the principal offender while

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1. (1949) 2 M.L.J. 705. 2. A.I.R. 1951 Pat. 231.

* W.P. No. 706 of 1965. 16th February, 1965.

those who are prosecuted are only abettors. Under section 337 pardon could be given to a person concerned in an offence whether as principal or abettor. Further, any defect or impropriety in the grant of pardon, will be a ground on which the accused can attack the evidence of the approver as and when he gives evidence for the purpose of reducing the value of his testimony. It will be certainly no ground for quashing the order granting pardon.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in M.P. No. 495 of 1964, dated 24th September, 1964, on the file of the Seventh Presidency Magistrate, Egmore, Madras, and quash the said order therein.

V. Ganapathi Subramania Iyer, for Petitioner.

The Court made the following

ORDER.—This is a novel case. The petitioner has filed the writ petition seeking a writ of *certiorari* to quash the order of the learned Seventh Presidency Magistrate passed on 24th September, 1964, granting pardon under section 337 of the Criminal Procedure Code to one Gurunathan. On a perusal of the affidavit filed in support of the writ petition and also after hearing the learned Counsel for the petitioner, the grounds on which he seeks the relief can be summarised thus :

The first is that section 337, Criminal Procedure Code, which provides the rule for tendering pardon to an accomplice on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, is a provision which is opposed to all principles of law, criminal jurisprudence and natural justice. Such a provision for tendering pardon to an accomplice for the purpose of securing " King's evidence " as it is commonly known in English Law, has existed for a long time as one of the recognised methods of obtaining evidence in criminal trials, in cases where other methods of obtaining evidence often fail, on the principle that it will be worthwhile to spare one of the several persons concerned in an offence from the consequence of a trial and punishment, if thereby other persons concerned along with him in the offence can be brought to justice. In bringing offenders to justice, there is no question of discrimination or of one offender claiming that he should be treated in the same way as the other, at the stage of investigation. It will be totally unjustifiable to attack section 337 of the Criminal Procedure Code, a provision enacted for the purpose of facilitating the securing of evidence to establish a criminal offence, on the ground that that section favours one accused person, who is prepared to turn King's evidence, at the expense of the other accused. Even an accomplice so selected for the award of pardon, cannot be said to have obtained complete exoneration from guilt. He has to comply with the terms of the undertaking on which pardon had been granted, and in the event of his violating the undertaking, he will, at the discretion of the authorities and on the certificate of the Public Prosecutor, be made to face a trial in the Court. Actually, the provision for tendering pardon is extended even beyond the stage of investigation, to the stage of trial under section 338 of the Criminal Procedure Code, which provides that at any time after commitment, but before judgment is made, the Court to which the commitment is made may, with a view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition (as in section 337, Criminal Procedure Code) to such a person. But section 338 is not the section to which reference is made in this writ petition.

The second contention of the learned Counsel appearing in this writ petition for the petitioner, is that section 337 of the Criminal Procedure Code offends Article 14 of the Constitution which states that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. There is no question in the present case of the denial of equal protection to all the accused involved in the case. It is alleged that the petitioner is the third accused, in a criminal case in the Court of the Sessions Judge, Madras, where,

they are being charged for offences of passing off spurious gold articles as genuine gold articles. The grievance of the petitioner appears to be that when there are a number of persons involved in an offence, discrimination within the meaning of Article 14 would be involved, when one is given pardon under section 337, Criminal Procedure Code, and the others are prosecuted. This clearly involves a misconception of the scope of Article 14. This is not a case of failure to give protection to the accused who are prosecuted. It is a case of refraining from prosecution of one accused for certain reasons enjoined by the statute in the interests of the successful prosecution of certain other persons, and getting the best evidence possible against them. It appears to me that the reference to Article 14 of the Constitution for this purpose, is wholly otiose.

The third contention of the petitioner is that Gurunathan to whom pardon has been granted is the principal offender, while the petitioner and some others, who are arraigned as accused in the Sessions Court, Madras, are only abettors or persons concerned in the offence in a relatively minor way. This argument overlooks the terms of section 337 itself, which provided that pardon could be given to a person concerned in the offence whether as principal or abettor. Reference made by the learned Counsel for the petitioner, to a decision of the Patna High Court in *Sheobhajan Ahir* v. *Emperor*[1], appears to be wholly irrelevant, because that was a case where the person to whom pardon was given, appeared to have been the real culprit, while the persons who were prosecuted were not so. There was no question of a principal offender and one who was only an abettor, in that case. Further, any defect or impropriety in the grant of pardon, will be a ground on which the accused can attack the evidence of the approver as and when he gives evidence for the purpose of reducing the value of its testimony. It will be certainly no ground for quashing the order granting pardon. The result of any such order will be to put a brake in giving effect to the statutory provisions for investigation of criminal offences, and it may also serve to obstruct the course of justice.

Finally, it was urged that a reference had been made to the trial Court under section 432 of the Criminal Procedure Code requesting that Court itself to state a case for the decision of the High Court about the validity of the grant of the pardon to Gurunathan in this case, on the ground that the grant of pardon involved a question as to the validity of a provision in the Criminal Procedure Code, but that the lower Court refused to state a case. I am of opinion that that order, in view of the reasons set forth above, must be deemed to be a proper one.

I therefore see no reason to admit this writ petition which is dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN.

T. Raghava Pillai and others .. *Petitioners* *

v.

Syed Valli Peeran .. *Respondent.*

Presidency Small Causes Courts Act (XV of 1882), sections 41 and 43—Summary eviction—Order—Need to conform to judicial standards—Jurisdiction under section 43—Nature of.

It is no doubt true that the proceedings under section 41 of the Presidency Small Causes Courts Act is a summary one and no elaborate judgment of the Court need be expected in such matters. It is equally true that merey because a tenant sought to be evicted might apply under section 9 of the Madras City Tenants' Protection Act the jurisdiction of the Small Cause Court to make an order under section 43 of the Presidency Small Causes Courts Act is not in any way affected.

But however summary the procedure or however brief the order of judgment might be, it should be passed only upon consideration of the merit of the respective contentions and it should be legally

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1. A.I.R. 1921 Pat. 499.

* C. R. P. Nos. 1760 and 1761 of 1964. 4th March, 1965.

adequate and conform to principles of justice. So long as there is an order that can be the subject of the exercise of the revisional powers of the High Court and it is made by a subordinate Court or Tribunal and further it is not an *ex parte* order but one on the merits, it must bear on the face of it evidence of the application of the judicial mind to the merits. The Court cannot merely rest its decision on its subjective satisfaction without any reference to the grounds of that decision.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Orders of the Registrar, Court of Small Causes, Madras, dated 27th July, 1964, and made in Ejt.M.P. Nos. 72 and 73 of 1964 respectively.

V. S. Rangaswamy Iyengar, for Petitioners.

B.V. Viswanatha Iyer, for Respondent.

The Court made the following

ORDER.—I may very briefly refer to the undisputed facts first. These are two orders of eviction passed by the Registrar of the Court of Small Causes at Madras, in proceedings before him for summary eviction under section 41 of the Presidency Small Cause Courts Act, 1882. The orders are very cryptic, and are merely to the effect that both parties were heard in person. This is followed by a direction for delivery by the specified date. Presumably, the order is under section 43 of the Act, and the Court was satisfied that the respondent was entitled to apply under section 41, and to obtain orders of eviction in both instances. Learned Counsel for revision petitioners has submitted an argument, with which I do not agree, that section 9 of the Madras City Tenants' Protection Act will place an embargo on a judgment of this kind, being pronounced within the time specified under that section. Though the City Tenants' Protection Act does refer to the sections relating to summary eviction under the Presidency Small Cause Courts Act, there is no provision of law in either Act that such eviction cannot be ordered, because the person sought to be evicted (tenant) may apply for his right of purchase of the site for value under section 9; on the contrary, the normal interpretation would be that the two procedures are independent of each other.

However that might be, the facts remain that the revision petitioners (defendants) resisted the eviction sought for upon certain pleas, which I am deliberately refraining from analysing at the present stage. It seems clear from the record that, after these written statements were filed, learned Counsel for the parties were absent on the date of hearing, and the parties alone were present; the Court appears to have heard the parties alone, and then to have passed the order, which is the subject-matter of the revisions. Admittedly, the procedure is a summary one, and no elaborate judgment of Court need be expected in such a matter. Even so, I am quite unable to accept the actual orders, as legally adequate or conforming to the principles of natural justice. When the evictions sought for were resisted on grounds appearing in the written statements, orders of Court, however summary they may be, will have to be passed only upon consideration of those grounds. Certainly, the Court is free to reject them as unsubstantial; but the interests of justice require that, however brief the order or judgment might be, it should be an indication of the application of the judicial mind to the facts of the instant case before Court, or to its merits. The observations of Jagadisan, J., in *Acharya* v. *Halima Meeran*[1] are in point here, though that ruling related to a judgment in a New Trial Application. The learned Judge observed:

> "The New Trial Court must say in its judgment what is the question of law raised before it, and then give its opinion either that it is not a question of law or if it is a question of law, it is not well founded."

In my view so long as there is an order that can be the subject of the exercise of the revisional power of this Court, and it is made by a subordinate Court or Tribunal, and further it is not an order *ex parte*, but one on the merits, it must bea on the face of it evidence of the application of the judicial mind to the merits. The Court cannot merely rest upon its subjective satisfaction, and give the decision alone, without any reference to the grounds for that decision.

1. (1962) 2 M.L.J. 443.

Accordingly, I allow the two revisions, set aside the orders of the Court, and remand the applications for ejectment for disposal by the Court, in the light of the observations now made. There will be no order as to costs.

R.M. ——— *Revisions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT:—MR. JUSTICE K. SADASIVAM.

Raichand Nethaji .. *Petitioner**

v.

Smt. Sayar Bai and another .. *Respondents*

Hindu Minority and Guardianship Act (XXXII of 1956), section 13—Appointment of guardian of Hindu minor—Welfare of minor is of paramount consideration—Must give place to other considerations.

Under section 13 of the Hindu Minority and Guardianship Act, in the appointment of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. Under section 13 (2) no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. Thus the welfare of the minor would always prevail when it conflicts with other considerations. Thus the fact that under Hindu law a person has preferential right to be appointed as guardian is only a matter of secondary consideration which should give place to the primary and paramount consideration, namely, the welfare of the minor.

In considering the welfare of a minor, the Court will consider the wishes of the minor, if she is of sufficient age to form an intelligent preference.

Held, on facts that the paternal uncle's son of the minor who lost her husband should be appointed as the guardian of the property for the minor in preference to her father-in-law who was interested in supporting the claim of his wife to a half-share in the insurance amount which became payable on the death of the minor's husband and whose interest was thus adverse to that of his minor daughter-in-law.

Petition for appointment of the petitioner as guardian of his minor daughter-in-law.

V. Srinivasan, for Petitioner.

A. V. Raghavan, for Respondent 1 and

Udairaj Gulecha, Respondent 2, appearing in person.

The Court delivered the following

JUDGMENT.—Petition under sections 7 and 10 of the Guardian and Wards Act for appointing the petitioner as guardian of his minor daughter-in-law Chandra Bhai, aged 16 years. Minor Chandra Bhai was married to the petitioner's son R. Mangilal Mehta. The said Mangilal Mehta died on 24th May, 1964, as a result of an explosion in a godown in Govindappa Naicken Street on 19th May, 1964. He had taken a multiple risk policy with the Life Insurance Corporation of India on 28th March, 1964, on his life. The petitioner's case is that he is entitled to be appointed as guardian of the minor under the Hindu Minority and Guardianship Act of 1956.

This application is opposed by Srimathi Sayar Bai, the mother of minor Chandra Bhai and also by Udairaj Gulecha, a cousin of minor Chandra Bhai. Neither side adduced oral evidence in this case. In fact the petitioner was not even present in Court and I was therefore unable to put questions to him in respect of the several allegations made against him in para. 10 of the counter of Udairaj Gulecha.

The learned Advocate for the petitioner relied on the statement on Principles of Hindu Law, Mulla, 12th Edition, page 619, para. 443, that after the husband's death, the guardianship of the wife, if she is a minor, devolves on the husband's

* O.P. No. 209 of 1964. 4th March, 1965.

relations in preference to her paternal relations. But it is stated in the same paragraph that it has been held in a Madras case that in default of the husband no other person is entitled to act as guardian *de jure* of the minor wife. In *Chinna Alagamperumal Karayalar* v. *Vinayagathammal*[1] it was held by a Bench of this Court that the husband is the legal guardian of his minor wife and if he happens to die during her minority, his nearest sapinda will be her guardian and not her paternal relations. Under section 13 of the Hindu Minority and Guardianship Act, in the appointment of any person as guardian of a Hindu minor by a Court, the welfare of the minor shall be the paramount consideration. Under section 13 (2) of the Act no person shall be entitled to the guardianship by virtue of the provisions of the Act or of any law relating to guardianship in marriage among Hindus, if the Court is of opinion that his or her guardianship will not be for the welfare of the minor. Thus the welfare of the minor would always prevail when it conflicts with other considerations. Thus the fact that under Hindu Law the petitioner has preferential right to be appointed as guardian is only a matter of secondary consideration which should give place to the primary and paramount consideration, namely, the welfare of the minor. There are several circumstances to show that it is against the welfare of the minor Chandra Bhai to appoint the petitioner as guardian of her property.

It is stated in the counter of the respondent Udairaj Gulecha that the petitioner is a sickly old man of 85 years and of unsound mind. But the petitioner has stated in his reply affidavit that he is only aged 75 years and not 85 years, that he is not mentally unsound or sickly, and that he is looking after his business. As the petitioner did not appear in person, I could not verify whether he is really physically and mentally sound.

The contention of the respondent is that the petitioner is in wrongful possession of the jewels of minor Chandra Bhai. But the petitioner has stated in his reply affidavit that Chandra Bhai has taken away the jewels which she was wearing and that the rest of the jewels are in the almirah. It is not possible to disqualify the petitioner from being appointed as property guardian of minor Chandra Bhai merely on account of the dispute about the jewels. But there can be no doubt in the case that the interest of the petitioner is adverse to that of his minor daughter-in-law Chandra Bhai. The petitioner's case is that his wife is entitled to half the insurance amount as one of the heirs of his deceased son, and that minor Chandra Bhai is entitled only to the other half share. But the contention of Srimathi Sayar Bai in her counter is that the insurance policy was taken out by the deceased R. Mangilal Mehta only for the benefit of minor Chandra Bhai and hence he nominated minor Chandra Bhai to receive the insurance amount and appointed Udairaj Gulecha as guardian of minor Chandra Bhai to receive the amount in case he predeceased her. Even in his reply affidavit the petitioner has put forward the contention that the nominee of a policy is only a collecting agent. It is unnecessary in this petition to determine the question whether the petitioner's wife is entitled to half the insurance amount and whether minor Chandra Bhai is entitled only to the other half of the insurance amount and not the entire amount claimed by her. But there can be no doubt that the petitioner is interested in supporting the claim of his wife to a half share in the insurance amount and therefore his interest is adverse to that of minor Chandra Bhai. It is therefore not desirable to appoint the petitioner as guardian of minor Chandra Bhai.

One significant circumstance to be noted in this case is that the deceased R. Mangilal Mehta himself has appointed Udairaj Gulecha as guardian of minor Chandra Bhai by describing him as brother and guardian of minor Chandra Bhai in the insurance policy. I am unable to accept the contention of the learned Advocate for the petitioner that Udairaj Gulecha had put himself as guardian in the insurance policy, and that the deceased R. Mangilal Mehta was not aware of it, as he did not know English. It is true that Udairaj Gulecha is only paternal uncle's son and not brother of minor Chandra Bhai as described in the insurance

1. (1928) 55 M.L.J. 861.

policy. But it is significant to note that when I examined minor Chandra Bhai in Court she referred to Udairaj Gulecha as her brother and it is only when I further questioned her whether he is her own brother, she explained the relationship by stating that he is her paternal uncle's son.

In considering the welfare of a minor, the Court will consider the wishes of the minor, if she is of sufficient age to form an intelligent preference. Minor Chandra-Bhai is more than 16 years old and she expressed her wishes that her brother Udairaj Gulecha who has been appointed as guardian by her husband should manage the properties in preference to her father-in-law. If fact she is afraid to go to her father-in-law's house, as she was ill-treated by her mother-in-law. Udairaj Gulecha is a junior Advocate of this Court and he is in every way a suitable person to be appointed as guardian of property of minor Chandra Bhai. Srimathi Sayar Bai, the mother of minor Chandra Bhai, has stated both in her counter and in person that she is willing to act as guardian for the minor, if the Court for any reason is not inclined to appoint Udairaj Gulecha as guardian of minor Chandra Bhai. Minor Chandra Bhai is living under the protection of her mother and it is therefore not necessary to appoint any guardian of the person of minor Chandra Bhai.

For the foregoing reasons, I appoint Udairaj Gulecha as guardian of property of minor Chandra Bhai on his furnishing security for the insurance amount.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

S. Sivaswamy .. *Appellant**

v.

The Inspector of Panchayats and Local Boards being the District Collector, Thanjavur and another .. *Respondents.*

Madras Panchayats Act (*XXXV of* 1958), *section* 150—*Removal of President—Resolution under section* 150—*If could be revoked or modified.*

Section 150 of the Madras Panchayats Act, 1958, provides the complete procedure for passing of a resolution for the removal of the President of a Panchayat. Unlike the corresponding provision in section 47 the earlier Panchayat Act, 1950, the present section provides that it is only by a resolution passed in the manner specified at a special meeting convened for the specific purpose and presided over by an officer as required by the section that the President could be removed. A resolution of a Panchayat once passed in accordance with the section accepting the Inspector's proposal for the removal of the President cannot be rescinded by the Panchayat after the notification. There is no provision in the section for the cancellation of a resolution once passed nor does the statute recognise any common law right in a Panchayat either to remove its President or restore to office a President who has been removed in accordance with its provisions. A resolution of a Panchayat under section 150 of the Act cannot therefore form part of the business of a Panchayat and such a resolution cannot be modified at any subsequent meeting convened by the President of the Panchayat.

Appeal under Clause 15 of the Letters Patent against the order of the Honourable Mr. Justice Srinivasan, dated 3rd December, 1963, †and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1235 of 1961 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for records relating to the order of the District Collector of Thanjavur dated 11th October, 1961, and made in R.O.C. No. 1703/61-M and quash the order therein.

K. V. Sankaran, for Appellant.

The Additional Government Pleader on behalf of the Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, C.J.:—The appellant, Sivaswami, was elected as the President of the Koothanur Panchayat in the year 1960 and has been functioning as

* W.A. No. 365 of 1963. 31st January, 1964.
† (1954) 1 M.L.J. 402

such since then. The Collector of Thanjavur, who is also the Inspector of Panchayats came across a number of instances of improper dealing with the moneys of the Panchayat by the appellant. The latter who was called upon to explain by the Collector, did not do so to the satisfaction of that authority. Conformably to the provisions of section 150 of the Madras Panchayats Act, 1958, the Collector who was also the Inspector of Panchayats forwarded the papers to the Tahsildar of Kumbakonam with a proposal for the removal of the appellant from the office of President, for the consideration of the Panchayat. A meeting of the Panchayat was convened on 30th August, 1961. It was presided over by the Tahsildar. Of the fifteen members of the Panchayat seven alone attended the meeting, the other eight, which included the appellant, abstained. The meeting unanimously passed a resolution accepting the Collector's proposal. On 11th October, 1961, the Collector issued a notification removing the appellant from office.

In the meanwhile, the appellant, purporting to act in his capacity as the President of the Panchayat, convened, by a notice dated 31st August, 1961, a meeting of the Panchayat for 11th September, 1961, to rescind the resolution of the Panchayat regarding his removal. At the meeting held on 11th September, 1961, it is said that the seven members, who passed the resolution accepting the proposal of the Inspector for the removal of the President, did not attend. It is also said that a resolution was passed at this meeting cancelling the earlier resolution. There is, however, no information available as to how many voted in favour of the resolution.

Armed with the later resolution, the appellant, applied to this Court under Article 226 of the Constitution to quash the notification of the Collector, dated 11th October, 1961. Srinivasan, J., rejected the application holding that the later resolution of the Panchayat was invalid inasmuch as the matters pertaining to removal of the President from office could not form the normal business of the Panchayat and that it would not be competent for that body to transact such business except by following the procedure prescribed by section 150 of the Act. That conclusion is challenged in this appeal.

There is yet another infirmity in the case of the appellant. It is not disputed that the meeting of the Panchayat convened for 30th August, 1961, for consideration of the proposal of the Inspector was a valid meeting which transacted its business in the prescribed way. The power to rescind the resolution passed in that meeting is claimed to vest in the Panchayat under rule 9 of the Rules framed under the Madras Panchayats Act, 1958. That rule states :

> "No resolution of a Panchayat shall be modified or cancelled within three months after the passing thereof except at a meeting specially convened in that behalf and by a resolution of a Panchayat supported by not less than one-half of the sanctioned number of members."

In the present case the resolution of 11th September, 1961, which purported to cancel the earlier resolution of 30th August, 1961, was not one, passed after the period prescribed by the above rule. Secondly, it has not been shown that not less than one-half of the sanctioned number of fifteen members voted in support of the resolution. It is, however, unnecessary to pursue that matter, as we are of the opinion that the appellant's case has to fail on a more substantial ground.

Mr. K. V. Sankaran appearing for the appellant contends that as it could be open to a Panchayat in the normal course of its business to cancel or modify any previous resolution passed by it in its corporate capacity, the resolution dated 11th September, 1961 must be held to have validly superseded the previous one. Support for this contention was sought from the terms of rule 4 (1) of the Rules contained at page 155 of Volume of the Guide Book on Panchayat Development in Madras State. That rule merely relates to the obligation of the President of the Panchayat to convene a meeting on the requisition in writing of not less than one-third of the members.

But the question in the present case is, whether the Panchayat, having once passed a valid resolution for the removal of its President under section 150 of the

Act, would have a power to cancel that resolution. On behalf of the appellant realiance is placed on the general rule of the law relating to Corporations, where it has been accepted that a power of amotion of a corporate officer is an incident of its normal powers.

In *Halsbury's Laws of England* (3rd Edition), Volume 9 at page 36, dealing with the matter of vacating the office by an officer of the Corporation, it is said :

"Amotion means depriving a corporate officer of his office. A power of amotion is incident to a Corporation. It is necessary to the good order and government of corporate bodies that there should be such a power, and a corporation may by its incidental power to make bye-laws confer upon itself power to amove for just cause, although there is no express power by the charter or prescription to make such a bye-law."

Again at page 40 :

"A power to restore after amotion is implied in every case where there is a power to elect to an office.................................."

It is argued that inasmuch as the President of a Panchayat is elected by the other members of the Panchayat, there should exist, under the ordinary law, an inherent power in the body to remove him from office as well as to restore him after removal. Such an inherent power has no doubt been recognised under the Common Law in England. In *Rex* v. *Richardson*[1], it was taken as established law that a power of amotion is incident to every corporation. A corporation in England is created by a Royal Charter or by virtue of a statute. In our country a Corporation can be created only by or under a statute. The powers of the Corporation have, therefore, to be ascertaned only by reference to the instrument of its creation, whether such an instrument be a Royal Charter or a statute. In *Dillon's Commentaries on the Law of Municiapl Corporations*[2] the rule as to amotion is stated thus :

"The question not being judicially settled as to our municipal corporations, the opinion is ventured that, in the absence of an express grant or statute conferring or limiting the power, the common council of one of our Municipal Corporations as ordinarily constituted, does possess, in the absence of any express or implied restriction in the charter, the incidental power, not only to make by-laws, but for cause, to expel its members, and, for cause, to remove corporate officers, whether elected by it or by the people".

What, therefore, one has to see is, whether there is an express or implied restriction so far as the Panchayat Act of 1958 is concerned in the Common Law power of a Corporation to remove its President.

The Act provides for the constitution of a Panchayat as a representative body and with a view to set up local administrative organizations in rural areas on the basis of election. The powers of a Panchayat are contained in Chapter III of the Act. Section 32 provides :

"The President shall cease to hold office as such on the expiry of his term of office as a member or on his otherwise ceasing to be a member."

Section 26 provides for cases where a member of Panchayat shall cease to hold office. The appellant has not suffered any of the disqualifications mentioned in that provision ; he has not, therefore, ceased to be a member of the Panchayat. Section 150 provides for the removal of the President and section 152 provides for a motion of no-confidence by the members of the Panchayat against its President. Both the sections provide a complete procedure in themselves for the passing of the resolution referred to therein. Under the previous Act, that is, the Madras Village Panchayats Act, 1950, section 47 empowered the Inspector to remove the President of a Panchayat, who, in his opinion, wilfully omitted or refused to carry out or disobeyed the provisions of the Act or any rules, bye-laws, regulations or lawful order issued thereunder, or abused the powers vested in him. But the Act of 1958 has made a change. It provides that if in the opinion of the Inspector, the President of a Panchayat is guilty of any of the acts or omissions aforesaid, he should send a proposal for his removal to the Panchayat and it is only if the Panchayat were to

1. 97 E.R. 426.

2. (1890) Edition, Vol. I, p. 329.

accept the proposal the President could be removed. Sub-clauses (3) and (5) of section 150 provides that the meeting for the consideration of the Inspector's proposal should be presided over by the Tahsildar and by nobody else. This provision, which enables the conduct of the meeting by an impartial third party, gives a further advantage to the President himself, who, in his capacity as a member of the Panchayat, could vote on the motion. Sub-clause (12) provides that if the proposal has been accepted by the Panchayat, the Inspector shall, by notification, remove the President from Office. Under sub-clause (13), once a notification has been issued, the President :

"shall be ineligible for election as President....................and for holding any of those Offices until the date on which notice of the next ordinary elections to the Panchayat is published in the prescribed manner or the expiry of one year from the date specified in the notification, whichever is earlier."

This provision, by itself suggests that a resolution once passed accepting the proposal of the Inspector as to removal of the President, cannot be rescinded by the Panchayat after the notification. To sum up: the statute itself provides for the tenure of office of the President of a Panchayat. If a President has not been removed under the provisions of section 150 or has resigned as a result of a no-confidence motion passed against him under section 152, he will be entitled to hold office as a President so long as he is a member of the Panchayat. The various provisions contained in section 150 show that a President can by removed only by following the procedure prescribed in that section. There is no provision in that section for the cancellation of a resolution once passed. It must, therefore, be held that the statute did not recognise any Common Law right in the Panchayat for removing its President, nor does it recognise any power in that body to restore a President who has been removed.

We therefore agree with Srinivasan, J., when he observed :

"It is clear, therefore, that it was not a normal business meeting of the Panchayat, that is contemplated by section 150, and the decision of the Panchayat under section 150 (11) is not a resolution of the Panchayat which is liable to be modified at a subsequent meeting. That particular proposal which led to the decision of the Panchayat cannot form part of the business of the Panchayat, which the President can, by convening a special meeting, cancel or modify."[1]

The appeal therefore fails and is dismissed with costs.

R.M. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE T. VENKATADRI.

M.S. Vadivelu Mudaliar and three others .. *Appellants**

v.

N. S. Rajabadar Mudaliar .. *Respondent.*

Deed—Interpretation of—Trust Deed—Property dedicated for religious or charitable purpose—What amounts to—Tests to find out nature of dedication—Effect of dedication—Direction as to disposal of properties—Effect—Applicability of doctrine of cypres.

Where a property is set apart for a charitable or religious purpose, the document generally takes one of two forms, (1) an absolute transfer of the property for the benefit of the intended trust in such a case, vesting of property can co-exist with minor dispositions out of the income from the property in favour of other persons or even the settlor's successors ; (2) a case where there is no disposition of property as such in favour of the charity but where it is merely kept or treated as a fund or source out of which the charity has to be performed. In such a case what the charity obtains is only a charge over the property, which will continue to remain at the disposal of the settlor and if he makes a disposition in favour of other persons, they will take the property subject to the charge in favour of the charity. If he does not create any such disposition, his successors will inherit the property as heirs as on intestacy, they also being liable, to pay out of the property amounts needed for the charity founded.

Whether a particular endowment or trust amounts to an absolute transfer of property for the institution although it might be burdened with minor dispositions in favour of other persons or whether

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* O.S.A. Nos. 13 and 39 of 1961. 6th February, 1964.

1. (1964) 1 M.L.J. 402.

it amounts merely to a charge in favour of charity depends upon the ascertainment of its true nature and where such endowment is in writing, upon a true construction of the document read as a whole. There is and can be no absolute or precise rule by which such document has to be considered. It is the substance of the document that has got to be found out. The real character of a document in such a case can be ascertained by considering the extent of the property alleged to be dedicated in relation to the expenses of the religious or charitable purpose. If the benefit is essentially to the charity the fact that certain amounts are paid out of the income of the property dedicated to the relatives of the settlor, will not take away the character of the dedication.

The doctrine of *cypres* will not apply where the testator has indicated a contrary intention, express or implied. Where the testator has specified certain amounts to be given for certain purposes and has directed that all surplus amounts should be utilized for purchase of additional properties for the benefit of the trust, it will not be open to a Court to increase the amounts payable, on the assumption of the applicability of the doctrine of *cypres*, on grounds that the income from the trust property has increased subsequently.

Appeals under Clause 15 of the Letters Patent and Order 36, rule 1, of Original Side Rules from the Judgment and decree of the Honourable Mr. Justice Ganapatia Pillai dated 1st November, 1960, and passed in the exercise of Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 20 of 1958.

V. Thiagarajan and *R. Desikan*, for Appellant in O.S.A. No. 13 of 1961 and respondent in O.S.A. No. 39 of 1961.

T. R. Sangameswara Iyer, for Respondent in O.S.A. No. 13 of 1961 and appellant in O.S. A. No. 39 of 1961.

The Judgment of the Court was delivered by

Ramachandra Iyer, C.J.—These appeals arise from the judgment of Ganapatia Pillai, J., and they involve the interpretation of trust deed dated 1st January, 1908, executed by one Subbu Daivanayaka Mudaliar. The settlor died in the year 1909, his only son Deiva Subbaroya Mudaliar having pre-deceased him seventeen years earlier. The widow of the latter had even during the lifetime of her father-in-law adopted one Saravana Mudaliar. There was a partition of the family properties between Subba Daivanayaka and his adopted grandson, Saravana. That transaction is evidenced by a document dated 25th November, 1907. Under that partition the property involved in the present litigation a house in Mint Street, Madras, which was then burdened with a mortgage liability for Rs. 3,000 was allotted to the share of Subba Daivanayaka. He created a trust over that property for the purposes to be presently mentioned. The trust deed is in Tamil. If discloses the settlor's intention to divest himself of the property for the purposes mentioned in the document. The document provides that during his lifetime the settlor was to reside as a tenant in a portion of the house paying rent; as and out of the income therefrom, the encumbrances existing on the property should first be discharged. It further directs that after the discharge of the mortgage liability certain festivals in a temple at Nungambakkam should be performed conformably to the conditions laid down. The material portions of the document are contained in paragraphs 7 to 9 and 11 and 12. They run thus :

" 7. After my lifetime, a sum of Rs. 10 per mensem shall be paid every month from and out of the aforesaid income to Amruthammal who is my daughter-in-law and widow of my deceased son Daiva Subbaroya Mudaliar, for her lifetime, for her charity expenses.

8. The trustees that may be functioning from time to time shall, after the lifetime of the aforesaid Amruthammal pay a sum of Rs. 10 per mensem permanently to Saravana Mudaliar who is her adopted son and my grandson, and after his life time, to his male descendants hereditarily.

9. As regards the expenses that may have to be incurred for maintaining during their (respective) lifetime and giving education in their youths for the children that may be born to the aforesaid Saravana Mudaliar in case he gets married and begets issue and the hereditary descendants of such issue, I have given full power to the trustees to the effect that the trustees who may be functioning from time to time, shall, from and out of the balance of the income remaining after meeting the expenses of the uthsavam to be celebrated in the aforesaid Nungambakkam Devasthanams and the trust expenses and the tax and maramath expenses mentioned in the preceding two paragraphs, expend such sum as they may deem proper and maintain and educate them (as aforesaid). In case the trustees are not willing, they shall stop (the same).

11. The trustees shall, after my lifetime, (spend) from and out of the aforesaid trust income in (such manner) as they may deem proper and have the Vasantha Uthsavam celebrated for a period of not less than three days during the Vasantha Utsavam (festival) which is being celebrated every year in the temples of Sri Agastheeswarar and Venkatesa Perumal installed by our ancestors and enshrined in Nungambakkam.

12. After my lifetime, the trustees shall accumulate the amount remaining out of the income from the aforesaid property after excluding the assessment, quit-rent and maramath and the monthly and annual expenses as aforesaid, the purchase (properties) therewith and provide (the same) as income for the aforesaid charity."

Saravana died issueless in the year 1914. The appellant who was the plaintiff in the suit out of which these appears arise instituted the suit for a declaration that the provisions of the trust deed to which we have made reference earlier were void and invalid and that he was entitled to recover possession of the properties free from all obligations specified in the document. There were other prayers in the plaint more or less of an incidental nature to which referenc is unnecessary.

Substantially the case of the plaintiff was that the dispositions contained in the document being contrary to the rule of perpetuity, its dispositive provisions should be regarded as void, and that the property involved in the suit regarded as the property of the settlor and after his lifetime of his heirs.

The suit was contested by the trustees appointed under the document. The learned Judge found that the document amounted to a valid dedication of the property for a religious purpose, that the rule of perpetuity would not apply to the case and that, therefore, the dispositions were valid. But at the same time the learned Judge took the view that having regard to the changed circumstances *viz.*, the increase in the income, the property yielded, it would be just and equitable that the settlor, Subbaraya's heirs should obtain a sum of Rs. 50 per mensem instead of Rs. 10 as provided under clause 7 of the document.

The plaintiff feeling aggrived by the decree has filed O.S.A. No. 39 of 1961. The trustees who too felt aggrieved by the increase in the allowances made to the settlor's family have filed O.S.A. No. 13 of 1961.

The only question for determination in O.S. No. 39 of 1961 is whether the property has been dedicated absolutely for the performance of Vasantha Uthsavam in the temples of Sri Agastheeswarar and Venkatesa Perumal. If that be so, the mere fact that members of the settlor's family are given certain benefits out of the income from the property or out of the available surplus will not affect the essential character of the dedication.

Where a property is set apart for a charitable or religious purpose, the endowment generally takes one of two forms: (1) an absolute transfer of the property for the benefit of the intended trust. In such a case, vesting of property can co-exist with minor dispositions out of the income from the property in favour of other persons or even the settlor's successors. (2) A case where there is no disposition of property as such in favour of the charity but where it is merely kept or treated as a fund or source out of which the charity has to be performed. In such a case what the charity obtains is only a charge over the property, which will continue to remain at the disposal of the settlor and if he makes dispositions in favour of other persons, they will take the property subject to the charge in favour of the charity. If he does not create any such disposition, his successors will inherit the property as heirs as on intestacy, they also being liable to pay out of the property amounts needed for the charity founded.

Whether a particular endowment or trust amounts to an absolute transfer of property for the institution although it might be burdened with minor dispositions in favour of other persons or whether it amounts merely to a charge in favour of charity depends upon the ascertainment of its true nature and where such endowment is in writing, upon a true construction of the document read as a whole. There is and can be no absolute or precise rule by which such document has to be considered. For example, it cannot be inferred as a matter of law that the distination of the surplus under a document indicates any intention on the part of the

settlor to vest the property in accordance therewith. Where the terms of the document are clear the intention of the testator or settlor has to be found only by referring to those terms and in the light of the surrounding circumstances.

Documents of trust not unoften contain words of dedicetion to charity but the mere fact that such words exist cannot mean that the property has been absolutely dedicated to charity, for it might sometimes be a cloak or device to cover up a different disposition. Therefore the substance of the document has got to be found out. If it is found, on a fair reading of the document, that the dedication was merely intended to preserve the property for the benefit of the successors of the settlor, then the disposition in favour of charity should be considered as illusory. Per contra; there may even be no words of dedication of property as such, there being only a disposition of the income therefrom. In such a case, the rule is that so long as there is nothing contrary in the document, dispositions of the income can be taken as determining the character of the disposition of the corpus. As has been pointed out in *Har Narayan* v. *Suraj Kunwari*[1] the question whether the idol (or charity) itself should be considered the true beneficiary, subject to a charge in favour of the heirs or specified relatives ofthe testator for their upkeep, or on the other hand such heirs should be considered the true beneficiaries of the property subject to a charge for the upkeep, worship and expenses of the idol, is a question which can only be settled by a conspectus of the entire provisions of the will or document. Where therefore the effect of a deed of dedication is to vest the property in a particular charity or for the purposes designated, the absolute character of the dedication will not be cut down merely by reason of the fact that certain members of the settlor's family or persons appointed by him are given certain benefits out of the property. Such benefits will not amount to transfer of property in their favour. It will be a mere charge or something to be paid out in the event of some contingency. Likewise as we said, there may be cases, where the dedication is purely illusory; or what is intended for the purposes of the charity might be nothing more than a charge, the substantial interest in the property vesting in the members of the settlor's family or in those appointed by him under the document. In short the dedication might be either absolute or partial. As pointed out by Lord Macmillan in *Sri Sri Iswari Bhubaneswari Thakurani* v. *Brojo Nath Dey*[2] what has to be considered for determining the real character of a document is.

> "It is also of importance to consider the extent of the property alleged to be dedicated in relation to the expense to be incurred and the ceremonies to be observed in the worship of the idol. The purposes of the dedication may be directed to expand as the income increases, or the purposes may be prescribed in limiting terms so that if the income increases beyond what is required for the fulfilment of these purposes it may not be protected by the dedication."

The passage extracted above gives a safe test for ascertaining whether a deed of dedication really amounts to a dedication or contains merely a charge in favour of the idol or charity. If for example the charity or service to be performed is fixed, consuming only a part of the income from the property dedicated while what is left over either to the heirs of the settler or other persons appointed by him is the substantial one, we can reasonably infer that the testator or settlor intended to create a mere charge in favour of such charity or service. If on the contrary, what is given to the appointee of the settlor under the document was only a fixed sum, not capable of any increase or one to be paid in a contingency or at the discretion of the trustee for the time being, there being no such discretion left with him in regard to the charity or where the charity is an expanding one, it can be taken that there is an absolute dedication of the property subject to a charge in favour of the appointees. Decided cases beyond helping us to ascertain the principles of interpretation might not be of much use in finding out whether in a particular case, the document is of one kind or the other.

Mr. T. R. Sangameswara Iyer, learned Counsel appearing for the appellant in O.S.A. No. 39 of 1961, has referred us to a number of decisions which according

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1. (1921) L.R. 48 I.A. 143 : I.L.R. 43 All. 291 P.C.

2. (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447 (P.C.).

to him will show that the destination of the surplus under a document will be decisive as to the character of the endowment. Reference was first made to the decision in *Ashutosh Dutt* v. *Doorga Churn Chatterjee*[1]. In that case the testatrix left a will bequeathing certain lands for the support of the daily worship of an idol and for certain other religious purposes with a provision that in the event of there being a surplus after these uses had been satisfied out of the income from the lands such surplus should be applied for the support of the family. The Privy Council found that the surplus available after meeting the fixed expenses of the religious purposes specified would be substantial and that provision relating thereto in favour of the members of the family amounted to a bequest of it to them. It was accordingly held that notwithstanding the direction given by the testatrix in her will to the effect that her heirs should have no power of gift or any other form of alienation over the property her intention was that the property should continue to remain with the family, the religious expenses being only met out of a part of the income therefrom. This was a case where the disposition was of the surplus which was substantial, that for the designated religious purposes amounting to no more than a charge. In *Har Narayan* v. *Surja Kunwari*[2] there was a similar document and the expenses of the worship maintenance, etc., of the idol in whose favour there was a will were fixed ; although the testament provided that the property of the testator should be considered as the property of the idol, it was provided that after meeting the expenses in favour of the idol the surplus in that case was to go to the heirs of the testator. The surplus was comparatively more substantial than the expenses intended for worship. The Privy Council held that as the expenditure upon the idol was fixed and would require only a small portion of the income that feature indicated that the intention of the founder was that the heir should take the property subject to a charge for the performance of the religious purposes named. In *Ramappa Naidu* v. *Lakshmanan Chettiar*[3] it was found that the charities which were set out in the will would not consume any considerable portion of the income even if they were conducted on a lavish scale, and that a very large amount of the income would be left intact for enjoyment by the family in whose favour a residuary disposition was made. Consequently it was held that the properties covered by the will were not absolutely dedicated to the trust but were only charged with carrying out the trust, the principal intention of the testator being to provide for the members of his family. *Thiruvengadamudayaniya* v. *Narasimhaswamiaiya*[4] was a similar case where it was held that the proper inference to be deduced from the terms of the document which directed the residuary legatee to take a substantial part of the income from the property for his own purpose while the religious and charitable purposes designated were to consume only a small or a fixed part of the income, was that the property was merely charged to the charitable uses the ownership vesting in the residuary legatee subject to the charge. The decision in *Sri Sri Iswari Bhubaneswari Thakurani* v. *Broja Nath Dey*[5] to which we have made reference earlier held that if on a fair reading of the document of trust as a whole it was found that it was not intended that the expenditure on the religious and charitable purposes should increase indefinitely with the growing income yielded by the properties but on the other hand the benefit of such increase was to be taken by the members of the family or persons designated by the settlor, it will be a reasonable inference to regard the dedication in favour of the charity as amounting to nothing more than a charge. In *Vasudeva Rao* v. *Rangai Goundar*[6] there were dispositions in favour of a number of charities and in regard to one of them there was no limit prescribed. There was no disposition in regard to the residue. One of the heirs of the settlor brought a suit contending that what has been given to the various charitable and religious purposes was nothing more than a charge on the property and as the property itself had not been disposed of by the settlor, it descended to him as on intestacy. The learned Judges after considering the various decisions, considered

1. (1880) I.L.R. 5 Cal. 438.
2. (1921) I.L.R. 43 All. 291 : L.R. 48 I.A. 143.
3. (1928) 54 M.L.J. 272.
4. (1941) 1 M.L.J. 488.
5. (1937) 2 M.L.J. 527 : L.R. 64 I.A. 203 : I.L.R. (1937) 2 Cal. 447.
6. (1951) 1 M.L.J. 588.

that having regard to the expanding nature of the charities the intention of the settlor must be taken to be to vest absolutely the property for the charities and not to leave anything for himself. Learned Counsel then invited our attention to the decision in *Ananda Charan* v. *Kamala Sundari*[1]. We are unable to find any different principle laid down in that case. In this connection we may refer to the decision of the Privy Council in *Jadu Nath Singh* v. *Thakur Sita Ramji*[2] where under the terms of a document of trust one half of the income was to be applied to the temple purposes and the other half for the maintenance of the trustees or the muttavallis thereof who were to come from the family of the settlor. The Privy Council held that the gift in favour of the idol had not been cut down by any other disposition in favour of others, the remuneration to the muttavallis being incidental to the proper management of the institution. In *Jainambukanni Ammal* v. *Rudrapathi Pillai*[3] the property was endowed for certain charitable and religious purposes but there was also disposition of the residuary income in favour of certain beneficiaries for a limited period. Nevertheless the dominant intention of the settlor as disclosed in the preamble as well as from the other parts of the document was found to be to vest the property for the benefit of an expanding charity. It will be apparent from the decisions to which we have just now made reference, that the question whether a document amounts to an absolute dedication of property in favour of a charity or whether it merely amounts to a charge on the property cannot be decided purely on a consideration as to who takes the surplus after meeting the expenses of the charity, but on a conspectus of all the terms thereof in the light of the numerous circumstances, the vital point to be taken into account being what is the proportion of the benefit received by the charity in relation to that received by the other beneficiaries. To reiterate what we said earlier if the benefit is essentially to the charity, the fact that certain amounts are paid out of the income from the property dedicated to the relatives of the settlor will not take away the character of the dedication. Therefore the fact that such amounts are to be paid out of the surplus, found after meeting the expenses of the charity cannot mean that what is given to the charity is merely a charge on the property and that the relatives of the settlor could take the property.

In the present case the dispositions under the document are clear. The property is absolutely given for the performance of utsavam in the temples. It will be noticed that the settlor has not prescribed any limit to the duration of the festival or to the amount to be spent upon it. Subject to the provisions of clause 7, the trustee in his discretion can expand the charity. It is only if the trustee finds a surplus after spending to the full on the charity that he is directed to devote certain amounts for the benefit of the education of the descendants of the settlor. Paragraph 7 of the trust deed contains the direction of payment of Rs. 10 per mensem to the descendants of the settlor. That will amount to a charge on the property. The other disposition in regard to educational expenses of the children of Saravana is one purely to be done at the discretion of the trustee who may give it for the purposes mentioned or perhaps even refuse to give. The descendants of the settlor cannot therefore be held to have any disposition in their favour which they can claim as of right. The document contains certain directions about the disposal of the accumulated surplus which is indicative of the intention of the settlor. It provides that the surplus amounts should be utilised for the purchase of properties to augument the resources of the charity specified. The property must accordingly be held as absolutely dedicated for the performance of the utsavams referred to in the document subject to the charge in favour of the relatives specified. The appeal fails and is dismissed.

O.S.A. No. 13 of 1961 concerns the direction given by the learned Judge for increasing the amount of Rs. 10 granted by the settlor under clause 7 of the trust deed to Rs. 50 per mensem. As the terms of the document will show, the settlor

1. A.I.R. 1936 Cal. 405.
2. (1917) I.L.R. 39 All. 553: L. R. 44 I.A. 187.
3. (1946) 1 M.L.J. 181.

did not authorise payment of anything more then Rs. 10 per month to his descendants. The learned Judge regarded this payment of Rs. 10 per month as one for the maintenance of the representatives of the donor and inasmuch as the income from the property had increased he thought that this allowance could be increased. He observed :

" Consequently the *cy-pres* rule can be invoked to increase the allowance payable to the descendants of the donor equally with the increased income being applied to the other utsavams to be performed in the temple because both are the declared objects of bounty of the settlor."

We are unable to accept the reason given by the learned Judge as a sound one. As we said, the settlor did not intend that his descendants should get more than Rs. 10 per mensem. We are unable to see how the *cy-pres* doctrine can at all be invoked in the present case. That doctrine is stated to be that if a general charitable intention is indicated but the particular object named is illegal the gift may be applied *cy-pres* Again where a fund given to charity is not exhausted by the particular purpose specified by the donor the surplus will be applied *cy-pres* if the donor had a general charitable intention. If no such intention is disclosed, the testator must be held to have left the surplus undisposed of. It is well settled that the doctrine of *cy-pres* will not apply where a contrary intention is expressed or implied from the language used by the testator. This rule is stated thus at page 324 of *Halsbury's laws of England*, Vol. 4 (3rd Edn.) :

" No application of *cy-pres* is possible in cases where a contrary intention is expressed or is to be implied from the language used by a testator; as for example, where there is a direction that on failure of a bequest the property shall fall into residue and the residue is not given to other charitable purposes, or where the objects of the original trust are capable of being carried into effect but remain unsatisfied or where the original trusts are still subsisting."

From the terms of the document to which we have made reference it is indisputable that the intention of the testator was that all the surplus income should be utilised to purchase additional properties for the benefit of the trust. There is therefore, no scope for the application of any rule of *cy-pres* so long as the objects of the trust exist. We are, further, unable to see how any direction by Court by way of application of *cy-press* doctrine can at all be made in this case where the only relief sought for was recovery of possession of the property from the trustees by the appellant. The question as to the application of *cy-pres* doctrine can arise only in suits filed under section 92 of the Civil Procedure Code or in other appropriate proceedings. We are therefore unable to sustain the increase of the maintenance allowance from Rs. 10 to Rs. 50. Mr. T. R. Sangameswara Iyer realising this difficulty sought to support the judgment of the learned Judge by referring to clause 9 of the document. That clause provides for payment of education and other expenses out of the surplus income at the discretion of the trustee. It is very doubtful whether the plaintiff who is not a son born of the loins of Subbaraya could at all obtain any benefit under clause 9 but even so that clause only vests a discretion in the trustee either to pay allowance or not to pay any allowance. It will not be open to the Court in such a case to issue a mandatory direction of the kind contained in the present decree. The result is that O.S.A. No. 13 of 1961 has got to be allowed with respect to the increase of the maintenance amount. There will be no order as to costs. The appellant in O.S.A. No. 39 of 1961 will pay court-fee due to the Government.

O. S. A. No. 39 *of* 1961 *dismissed and*
O.S.A. No. 13 *of* 1961 *allowed.*

R.M.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

M/s. K. J. Lingam and A.V. Malayalam, represented by the executor to the estate of K. J. Lingam (deceased) .. *Petitioner* *

v.

The State of Madras represented by the Joint Commercial Tax Officer, Mount Road Division, Madras .. *Respondent.*

Madras General Sales Tax Act (I of 1959), sections 2 (g) and 10—'Dealer' and 'first sale'—Burden of proof—Military Department of Government entrusting disposal of surplus or condemned stores to Director-General of Supplies and Disposals—Director-General if dealer——Assessee purchasing such goods from Director-General of Supplies and Disposals—If could claim exemption on the ground that his was not the first sale.

Words and Phrases—"Business"—Dealer and "first sale"—Meaning of.

The fact that the Military Department of the Government entrusted their condemned stores, like motor vehicles, to the Director-General of Supplies and Disposals for sale by public auction, does not make the Director-General a 'dealer' within the meaning of section 2 (*g*) of the Madras General Sales Tax Act. The Director-General is not engaged in any profit making enterprise in discharging his duties as the branch of the Government. No conception of any business activity either on the part of the Government Department or the Director-General arise in such cases. Hence an assessee cannot seek exemption from tax on the ground that the sale by the Director-General was a first sale. The onus of proof that he is not the first dealer is on the assessee under section 10 of the Madras General Sales Tax Act.

The expression 'business', though extensively used, is a word of indefinite import. In taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings either actually continued or contemplated to be continued with a profit motive and not for sport or pleasure.

Petition under section 38 of Madras Act I of 1959, praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 17th April, 1963 and made in T.A. No. 294 of 1962 against Assessment for year 1960-61 in Appeal No 486/61-62, dated 16th January, 1962 on the file of the Appellate Assistant Commissioner (C.T.), Madras III, (Assessment No. MGST. 1340/60-61, dated 28th October, 1961 on the file of the Joint Commercial Tax Officer, Mount Road Division, Madras).

C. Venkataraman, for Petitioner.

G. Ramanujam for the Government Pleader on behalf of Respondent.

The Judgment of the Court was delivered by

Ramakrishnan, J.—This Revision Case is filed against the order of the Sales Tax Appellate Tribunal in T.A. No. 294 of 1962. The assessees are dealers in motor vehicles and spare parts. We are now concerned in the present Revision Case with motor vehicles which the assessee purchased at Avadi within the Madras State from the Director-General of Supplies and Disposals, subsequently broke them into parts and sold them. These spare parts are assessable under the Madras General Sales Tax Act at the point of the first sale in this State. Treating the assessees as dealers effecting the first sale of the aforesaid articles, the Department assessed them to sales tax. This part of the turnover comes to Rs. 1,15,589. The contention of the assessees before the Department as well as before the Tribunal was that the first seller in regard to the above turnover was the Director-General of Supplies and Disposals. It is common ground that these motor vehicles, which were sold by the Director-General of Supplies and Disposals, were vehicles belonging to the Military Department, which were found unusable or condemned and were entrusted to the Director-General of Supplies and Disposals for disposal to the best advantage. The assessing authority as well as the Sales Tax Appellate Tribunal rejected the contention of the assessees that the Director-General of Supplies and Disposals, whose services wer requisitioned by the Military Department for effecting these sales, was a "dealer" within the definition of section 2(*g*) of the Madras

*(Revision No. 119 of 1963) Tax Case No. 188 of 1963. 19th August, 1964.

Sales Tax Act, 1959 (before the addition of *Explanation* 2 by Act V of 1962), so far as the disputed turnover was concerned. The assessees were, therefore, held liable to be taxed. They have appealed to us from the above decision.

Learned Counsel appearing for the petitioners has submitted that the Director-General of Supplies and Disposals charges 2 per cent as departmental charges for such sales and also that the Office of the Director-General of Supplies and Disposals maintains a Commercial Intelligence Cell and a Statistics Department whose advice he takes for effecting sales. But this kind of activity of the Director-General of Supplies and Disposals will not make him a " dealer " within the definition of that term in the General Sales Tax Act. In a recent decision of the Supreme Court in *State of Andhra Pradesh* v. *Abdul Bakshi & Bros.*[1] it has been observed at page 647 :

> " The expression ' business ' though extensively used is a word of indefinite import. In taxing statutes it is used in the sense of an occupation or profession which occupies the time, attention and labour of a person, normally with the object of making profit. To regard an activity as business there must be a course of dealings either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure."

The onus is on the assessee according to section 10 of the Madras General Sales Tax Act to prove that he is not the first dealer liable to pay sales tax but only a subsequent dealer entitled to exemption. From the materials available to us, we cannot conclude that the Director-General of Supplies and Disposals is engaged in a profit-making enterprise. Learned Government Pleader has urged that the Director-General of Supplies and Disposals is in charge of a branch of the Central Government which assists other departments of the Government of India in the matter of obtaining supplies and also disposing of surplus or condemned stock. In the present case, the Military Department found certain motor vehicles unfit for use and had indented upon the special skill and experience of the Director-General of Supplies and Disposals for selling the vehicles at the most advantageous price in the market. But the Military Department whose instrument or agent the Director-General of Supplies and Disposals is in making these sales, is not certainly engaged in a profit-making activity. The Director-General of Supplies and Disposals after effecting sales of these vehicles, deducts the prescribed departmental charges and credits the balance to the Military Department. It is fairly obvious that in the matter of sales of certain unusable or condemned motor vehicles, no conception of any business activity either on the part of the Military Department, or of the Director-General of Supplies and Disposals who was its instrument or agent for effecting the sales can reasonably arise.

We are therefore of the opinion that the assessees were rightly assessed to tax on this disputed turnover. The Revision Case is therefore dismissed. There will be no order as to costs.

R.M. ——— *Revision case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Ayyavoo Chetty .. *Petitioner**

Madras City Police Act (III of 1888), section 65—Prosecution under—Nature and burden of proof—Scope of.

In order to convict a person for an offence under section 65 of the Madras City Police Act it must be established by the prosecution that the accused is in possession of certain property for which he is not in a position to account and that there is reason to believe that such property should be either stolen or fraudulently obtained. It is not the opinion of the Police Officer that will decide the issue but the Court should be in possession of all the circumstances in order to satisfy itself whether a reasonable person could believe that the property is stolen or fraudulently obtained. The burden of satisfactorily accounting for his possession which section 65 lays on the accused will have to be discharged by him only after the prosecution advances *prima facie* evidence for sustaining the initial

1. (1965) 1 S.C.J. 297 : (1965) 1 M.L.J. (S.C.) 29 : (1965) 1 An.W.R. (S.C.) 29 ; 15 S.T.C. 644 (647).

* Cr. R. C. No. 2114 of 1963 (Cr.R. P. No. 2060 of 1963.) 4th September, 1964.

belief regarding the property being stolen or being fraudulently obtained. The fact that the nature of the property was such that its distribution was restricted cannot raise any presumption that it was stolen or fraudulently obtained. The hearsay evidence of the officer who seized the property that he heard that the property was smuggled or stolen is no substitution for legal proof, the burden of which is on the prosecution.

Section 65 of the City Police Act is not intended to deal with offences of hoarding and profiteering in essential commodities. It only deals with the offence of possessing stolen property or property fraudulently obtained. The emphasis is on the process by which the possession of the property is obtained and not upon the manner in which it is sought to be disposed of subsequently.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Sub-Divisional, Magistrate, Erode, dated 11th day of July, 1962 and passed in Criminal Appeal No. 53 of 1963 (C.C. No. 713 of 1963, Sub-Magistrate, Erode).

K. A. Panchapagesan for Petitioner.

N. Srivatsamani for the Public Prosecutor on behalf of the State.

The Court made the following

ORDER.—The petitioner in this case, who is the 2nd accused in the trial Court has been convicted under section 65 of the Madras City Police Act for having in his possession 65 bags of urea and 15 bags of ammonium sulphate (chemical fertilizers) and sentenced to pay a fine of Rs. 50 with default sentence. The case was tried by the Sub-Magistrate, Erode, who convicted the petitioner under section 65 of the Madras City Police Act and sentenced him as aforesaid. The conviction and sentence of fine were confirmed by the Sub-Divisional Magistrate, Erode. The Criminal Revision Case is filed by the 2nd accused.

There is no dispute that the premises from which the abovesaid fertilizer was recovered by the Sub-Inspector of Police were, at the time of the recovery, in the possession of the petitioner who was the 2nd accused in the trial Court. He too does not dispute the factum of possession of this quantity of fertilizer. It is not also in dispute that when the seizure was effected, there was in force certain rules framed under the Essential Commodities Act, 1955 which fixed the price of the fertilizer and also prescribed that a seller in this commodity should take a licence for the sale. But there is no statement on behalf of the prosecution that possession of such chemical fertilizer above any prescribed minimum quantity was an offence. Section 65 of the Madras City Police Act reads :

> " Whoever is found in possession or is proved to have been in possession of anything which there is reason to believe to be stolen property or property fraudulently obtained and for the possession of which he fails satisfactorily to account, shall be liable on conviction to fine not exceeding one hundred rupees or to imprisonment not exceeding three months."

There is no evidence on behalf of the prosecution to prove that the circumstances of the petitioner's possession of the fertilizer were such that one can entertain a reasonable belief that it was stolen property. The further question is whether the circumstance of the possession by the petitioner of fertilizer was sufficient to show that it must have been property fraudulently obtained by him. The only evidence adduced by the prosecution to prove this essential ingredient is the evidence of the Sub-Inspector of Police, Erode, who made the seizure. According to him, he had information that ammonium sulphate and urea had been smuggled from Mysore State. But that is only hearsay and cannot take the place of proof. Later on in his evidence, the Sub-Inspector shifted his ground and contented himself with the statement, that investigation had revealed that the petitioner had fraudulently obtained these bags for sale. This again is hearsay and the Sub-Inspector's satisfaction that the accused had obtained the bags of fertilizer would not suffice to prove the necessary ingredient for the offence. It is not the Sub-Inspector's belief about the goods being stolen property or about the property being fraudulently obtained that is required for proving the ingredients of the offence. The circumstances which the Sub-Inspector relied upon must be placed before the Court and the Court must be satisfied, on the scrutiny of those circumstances, that a reasonable

person can believe, as a result, that the property was stolen or fraudulently obtained. Unfortunately both the trial Court as well as the appellate Court did not bear this essential requirement in mind.

The Sub-Magistrate observed after referring to the evidence of P.W. 1 that the belief of P.W. 1 that the bags were either stolen or fraudulently obtained was not baseless or unfounded and the "belief stands good even at this stage in my opinion inasmuch as the distribution of ammonium sulphate and urea is restricted." Adverting to the last observation of the Sub-Magistrate that the distribution of ammonium sulphate and urea is restricted, the explanation of the petitioner that farmers who had obtained this fertilizer had pledged it with him cannot be ruled out as an impossibility. The burden of satisfactorily accounting for his possession, which section 65 lays on the petitioner, has to be discharged only after the prosecution adduces *prima facie* evidence for sustaining a belief regarding the property being stolen or being fraudulently obtained. The petitioner might have hoarded the stock of fertilizer by getting it from a number of persons who might have obtained it legitimately, with a view to dispose of it at high prices. But section 65 of the City Police Act is not the section intended to deal with such objectionable activity of hoarding or profiteering. It only deals with the offence of possessing stolen property or possessing property fraudulently obtained. Stress is thus laid upon the process by which the possession of property is obtained, and not upon the manner in which the petitioner might intend to dispose of the property subsequently.

The Sub-Divisional Magistrate in appeal has made a curious remark that "admittedly" the petitioner had come into possession of the bags in a fraudulent way.

Nowhere has the petitioner admitted that he obtained the bags of fertilizer in a fraudulent manner. His case, as already stated, was that the bags were pledged with him by farmers, who had obtained them legitimately, and he produced some receipts Exhibit D-1 series in support of his plea. These receipts were disbelieved by the Courts below. But that is a different thing from saying that the petitioner admitted that he came into possession of the fertilizer fraudulently.

In view of the foregoing, I am of opinion that the evidence of the Sub-Inspector to which I have made reference is not sufficient for proving the necessary ingredients for the offence namely that the fertilizer was obtained by the petitioner in a fraudulent manner. As mentioned already, there is no case urged that the property can be considered to be stolen property.

For the aforesaid reasons, I allow the Revision Petition and set aside the conviction of the petitioner. The sentence of fine is also set aside and the fine, if collected, will be refunded. The order about confiscation of the property is also not justified as there is no provision of law brought to my notice prohibiting the possession of this commodity as such. This order is also set aside.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

R. Arumugham .. *Petitioner* *

v.

R. Krishnaswamy by power Agent, Sankara Kavandar .. *Respondent.*

Foreign Exchange Regulation Act (*VII of* 1947), *sections* 5 *and* 21—*Money lent on a bond in Malaya and borrower agreeing to repay in India—Action in India to recover debt due on the bond—Maintainability.*

The plaintiff advanced a sum of about 500 dollars to the defendant in Malaya and the defendant executed a bond agreeing to pay the amount in India. On the question if the provisions of the Foreign Exchange Regulation Act would affect the maintainability of a suit on the bond in India,

Held, the Act does not prevent a person from taking legal proceedings in India to recover any sum due from another person who is in law bound to pay the same. The only restrictions are that no

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* C.R. P. No. 452 of 1962. 30th November, 1964.

steps in execution of a judgment or order can be taken except to the extent permitted by the Central Government or the Reserve Bank of India.

Petition under section 115 of Act V of 1908 praying the High Court to revise the decree of the District Court, East Thanjavur at Nagapattinam, dated 5th September, 1961 and passed in A.S. No. 43 of 1961 (O.S. No. 197 of 1960 on the file of the District Munsif's Court, Tiruturaipoondi).

R. Gopalaswamy Iyengar, for Petitioner.

K. S. Naidu and *R. Vijayan*, for Respondent.

The Court delivered the following

JUDGMENT.—The Revision Petition has been filed against an order of dismissal of the suit filed by the petitioner, for recovery of a sum of Rs. 883-06 nP.

The facts necessary for disposal of this petition are as follows: The petitioner advanced a sum of 574 dollars to the respondent herein in Malaya in the middle of June, 1957, and the latter executed a bond, Exhibit A-1, on 1st July, 1957, agreeing to pay the amount in India. As soon as the plaintiff-petitioner returned to India, he claimed the said amount. When the respondent refused to pay the amount, the petitioner filed the present suit. The respondent herein resisted the suit, on the ground that he never borrowed the money from the petitioner in Malaya, that he did not execute the bond, Exhibit-A-1, that the bond was a forged document and that the Court of the District Munsif had no jurisdiction to try the suit, as the respondent was a permanent resident of Malaya. He further pleaded that the suit was barred by limitation and also barred by the provisions of the Foreign Exchange Regulation Act. He also pleaded that the suit was opposed to public policy. On these pleadings, the parties went to trial before the learned District Munsif of Tiruturaipoondi.

The learned District Munsif found that the suit document must be construed as a bond and that the suit filed on the basis of it was certainly maintainable. He also found that the bond Exhibit A-1 was executed by the respondent, that the District Munsif's Court has jurisdiction to try the suit and that the Foreign Exchange Regulation Act (VII of 1947), did not bar the maintainability of the suit. In the end, he decreed the suit. But on appeal filed by the respondent herein to the District Court of East Thanjavur at Nagapattinam, the learned District Judge agreed with almost all the findings of the District Munsif, but he held that the suit was not maintainable, as the same was barred by the provisions of the Foreign Exchange Regulation Act. The District Judge, therefore, allowed the appeal and dismissed the suit of the petitioner herein. Against the dismissal of the suit, the plaintiff has filed this Revision Petition.

Now, the only question for consideration is whether section 5 of the Foreign Exchange Regulation Act bars the maintainability of the suit. There is an unreported decision of this Court in *Abdul Hameed* v. *Mohamed Ismail*[1] on the interpretation of section 5 of the Act. The facts in that case are almost similar to the facts in the instant case. There, the plaintiff entrusted to the defendant in Indo-China jewels and cash, with a request to deliver the same to his wife in Mayavaram. The defendant did not deliver the jewels and cash. The plaintiff, after coming to India, demanded the return of the jewels and cash. After mediation, the defendant executed a promissory note for a sum of Rs. 1,200, being the value of jewels and cash entrusted to him. The plaintiff filed a suit on that promissory note. The defendant contended that the suit was not maintainable under the provisions of the Foreign Exchange Regulation Act. Holding that the suit-promissory note could not be enforced, Krishnaswamy Nayudu, J., made the following observation:

"The language of section 5 (1) (*f*) and (*e*) (i) is very plain and the learned Subordinate Judge has rightly held that this is a transaction which comes within the scope of the particular provision referred to in section 5 of Act VII of 1947. The transaction therefore against the provision of the statute must be considered as unlawful and in any event against public policy and therefore the suit pro-note cannot be enforced".

1. S. A. No. 1745 of 1952.

But, learned Counsel for the petitioner drew my attention to a subsequent decision of the Calcutta High Court in *Rabindra N. Maitra* v. *L.I.C., of India*[1] where the principle laid in section 5 of the Foreign Exchange Regulation Act came in for consideration, The learned Judge of the Calcutta High Court observed:

> "Foreign Exchange Regulation Act, 1947, has no application as no foreign exchange is involved in this case. Section 5 of the Act upon which much argument was made is only attracted when payment is made or intended to be made to a person or to his credit resident outside India. Here the defendant is called upon by a permanent resident of India to pay him in India."

My attention was also drawn to section 21 of the Act. Under section 21, sub-section (3) of that section, legal proceedings to recover an amount due under any legal obligation are not barred simply because they require things to be done which are contrary to the Act so that persons may not by deliberately not applying for permission under the Act avoid fulfilment of their contracts without penalty. The Act, therefore, does not prevent a person from taking legal proceedings in India to recover any sum due from another person who is in law bound to pay the same. The only restrictions are that no steps in execution of a judgment or order can be taken except to the extent permitted by the Central Government or the Reserve Bank of India. Learned Counsel for the petitioner also cited the decision in *Gobindam* v. *M/s. Shamji & Co.*[2]. The Supreme Court has observed at page 1290 as follows:

> "Sub-section (3) of section 21 allows legal proceedings to be brought to recover sum due as a debt, damages or otherwise, but no steps shall be taken to enforce the judgment, etc., except to the extent permitted by the Reserve Bank."

Following the principles laid down in these cases, I am of opinion that the petitioner-plaintiff will be entitled to a decree. The only restriction will be that he cannot execute the decree without obtaining the necessary permission from the concerned authorities mentioned in the Foreign Exchange Regulation Act, 1947.

The Revision Petition is, therefore, allowed, but, there will be no order as to costs.

V.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

Hussainny J. Bhagat and another .. *Appellants* *

v.

Life Insurance Corporation of India, Mount Road, Madras-2 .. *Respondent.*

Evidence Act (I of 1872), section 108—Presumption under—Scope of—Suit for declaration that a person not heard of for seven years is presumed to be dead—Onus of proof—Declaration as to exact date of death—When could be given.

Section 108 of the Evidence Act no doubt lays down a presumption under the law that where the question is whether a person is alive or dead and it is proved that such person has not been heard of for seven years by those who could normally have heard of him if he had been alive, the burden of proving that such person is alive is shifted to the person who affirms it. But even in such cases the Court cannot presume anything that the person was alive up to the end of any period prior to seven years or that he died at any particular point of time during such period. The only presumption that could be had is a restricted one that the person was dead at the time the question arose if he has not been heard of during the preceding seven years. If a declaration is sought that a person died on any particular date within the period of seven years it must be proved by evidence raising that inference *e.g.*, when last heard of he was in bad health or exposed to unusual peril or failed to apply for periodical payment upon which he was dependent for support and so on.

Appeal against the Decree of the Additional Judge, City Civil Court, Madras, dated 19th February, 1963, in Appeal Suit No. 150 of 1961, preferred against the decree of the First Assistant Judge, City Civil Court, Madras in Original Suit No. 209 of 1960.

S. V. Subramaniyam, for Appellant.

R. Narasimachari and *N. Varadarajan*, for Respondent.

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1. A.I.R. 1964 Cal. 141. 2. A.I.R. 1961 S.C. 1285.

*S.A. No. 76 of 1964. 29th January, 1965.

The Court delivered the following

JUDGMENT.—This Second Appeal involves a question of considerable interest, upon which I am not able to find many decided authorities in this country; there are, indisputably, English authorities, but, for reasons I shall state later, I am certainly doubtful if those authorities could be implicitly followed in India. The broad facts are not in controversy, and a very brief conspectus of them will be sufficient for the disposal of the appeal.

There was a certain T.J. Bhagat, a young man of about 24, who according to the record, disappeared from his house on 12th December, 1950, and has not been subsequently heard of. It is proved that this young man was married, that he was living with his parents and brothers, and that he was receiving a regular allowance of Rs. 100 per mensem from Bhagat Estates Limited, a family concern. His father-in-law inserted an advertisement in the "Hindu" in January, 1951, along with a photograph, announcing a reward for the informer of the where abouts of the missing youngman. There was also a complaint to the police. But these efforts were all in vain and, to this day, T. J. Bhagat, who is said to have disappeared on 12th December, 1950, has not been traced. There were heavy insurances upon the life of this young man-one policy with the Sun Life Assurance Company of Canada and another with the Hindusthan Co-operative Insurance Society now taken over by the defendant, Life Insurance Corporation of India.

About 5 or 6 years after the disappearance of this young man, his father (the 1st plaintiff) preferred a claim in respect of one of the policies with the defendant-Corporation, and some correspondence followed. It is not in dispute that the defendant Corporation insisted on a decree from a competent Court establishing the fact of death. That led to the suit from which the Second Appeal has emerged. The declaration actually sought for by the plaintiffs, legal representatives of the deceased 1st plaintiff, was to the effect that T. J. Bhagat should be presumed to be dead as and from 12th December, 1950, or at any rate from January, 1951. The defendant-Corporation did not admit the allegations, put the plaintiff to strict proof of them, and contended that claims arising under the policies could not be directly the subject-matter of the suit, but would have to be dealt with after enquiry, on their merits.

The learned First Assistant Judge of the City Civil Court granted a decree declaring that T. J. Bhagat has not been heard of for at least seven years prior to the institution of the suit and must therefore, be presumed to be dead; indisputably, the declaration can have meaning and reference only to the date on which the action commenced, as regards the presumption of death. There was a first appeal to the learned Additional Judge of the City Civil Court, which was dismissed.

In this country, the presumption arising upon facts of this kind has been subject of statute; the Indian Evidence Act which deals with general presumptions under the law, declares in section 108 that where the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it. Since Bhagat was not heard of on and after 12th December, 1950, the burden of proving that he was alive on the date of action was shifted to the defendant-Corporation. It seems to be incontrovertible that the defendant-Corporation did not discharge that burden of proof. In the light of those facts, the plaintiffs would clearly appear to be entitled to the declaration granted. But learned Counsel for the plaintiffs (appellants in the second appeal) strenuously contends that the declaration should be in the form it was sought for, namely, that Bhagat should be presumed to be dead as and from 12th December, 1950, or at any rate from January, 1951, when he failed to appear and draw the allowance of Rs. 100 which was the sole means of his subsistance and which he had regularly drawn prior to that time. It is only if the declaration is granted in this form that plaintiffs will be able to make an effective claim regarding all outstanding amounts upon both the policies. It is further contended that light in thrown on

this issue by the English decisions. Even section 108 of the Indian Evidence Act proceeds no more than to the extent that I have earlier indicated.

Indisputably, section 108 itself is founded upon the principles of English Common Law, which have been tersely stated in Halsbury's Laws of England, Simonds Edition, Volume 15, section 624, page 345. As this authoritative treatise states :

"There is no legal presumption either that the person concerned was alive up to the end of the period of not less than seven years, or that he died at any particular point of time during such period, the only presumption being that he was dead at the time the question arose if he has not been heard of during the preceding seven years. If it is necessary to establish that a person died at any particular date within the period of seven years, this must be proved as a fact by evidence raising that inference, for example, that when last heard of he was in bad health, or exposed to unusual perils, or had failed to apply for a periodical payment upon which he was dependent for support."

I do not think that it can be at all doubted that the above passage, the substance of which is also reflected in our own enactment, namely, section 108 of the Indian Evidence Act, justifies the restricted declaration which the Courts below have granted, unless the last part of the passage extracted above is brought in to aid the plaintiffs in obtaining the wider declaration they actually seek. For the shifting of the onus itself relates only to the point of time at which the question arose after the lapse of seven years, during which the party presumed to be dead has not been heard of. That can only be the date of the institution of the suit, and, on that date, when the defendant-Corporation did not discharge the burden, it must be presumed that the young man was dead. There is no legal presumption that he died at any earlier point of time, or even that he was alive up to any particular date. Any such inference can only be based on the strength of the facts in the individual case.

But learned Counsel for the appellants contends that the fact that the young man failed to apply for his regular allowance of Rs. 100 per mensem, which was his sole means of subsistence in January, 1951, would justify an inference that he was dead by that date. The authorities to which my attention has been drawn may be now briefly referred to. In re, *Beasney's Trusts*[1], refers to an earlier case In re, *Hendersons Trusts*[2] and, on the facts, the Vice-Chancellor held that the fact that William Beasney never applied for his October dividends could be accounted for, only on the presumption that he was dead then. The report In re, *Henderson's Trusts*[2], is not available, in spite of efforts made by me to trace it ; actually it seems to be an unreported decision of July, 1868. But the facts of that case have been referred to in one report. In re, *Beasney's Trusts*[1]. That again related to the holder of an annuity who did not apply for the dividends of certain trust funds on which he was chiefly dependent for his livelihood. In re, *Aldersey, Gibson* v. *Hall*[3], contains the statement of the law by Kekewich, J., to the effect that, where a party claims that the concerned individual, John Joseph Hall, was alive after the date when he was last heard of, the burden would be on the party to establish that ; there is no presumption in favour of the continuance of life ; it is entirely a matter of evidence in each case. *Webster* v. *Birchmore*[4], may also be referred to in this context as well as the passage from Macgillivray on Insurance Law, second edition, page 557 to the effect that

" As a rule, the date of disappearance is a more probable date of death than any other point of time during the seven years..........If the Court finds it necessary to come to some decision as to the date of death in the absence of any evidence beyond the fact of seven years' absence, it fixes the date of disappearance as the date of death. "

I have given careful consideration to this aspect, both on the principle of law applicable to facts of this matter, and to the merits of the present case. In my view, it would be very unsafe to enunciate any general principle of law applicable to this country that, where a person has disappeared and has not been heard of for seven years, the presumption of death might be made not merely with reference to the point of time at which the question arose after the expiry of seven years, but even with reference to the point of time when the person actually disappeared, without any

1. L.R. 7 Eq. 498.
2. Unreported decision of July, 1868.
3. L.R. (1905) 2 Ch.181.
4. 13 Ves. Junior 329.

other light being thrown upon the facts of that disappearance. It is noteworthy that under section 108 of the Indian Evidence Act the burden shifts to the party who affirms that the person "is alive"; it cannot be disputed that that relates to the point of time at which the question itself emerges in the legal proceeding. In the present case, it would be most unsafe, unwarranted by facts and probabilities to draw any inference that Bhagat must be presumed to have died on or about the date of his disappearance or in January, 1951 when he failed to draw the usual remittance, The young man suddenlty disappeared, and no light is thrown on any probable motive; nor is it suggested that foul play was at work, or that anyone had a motive to murder this young man, or even that he met with some accident or peril. All that we know is that this young man disappeared without a trace, and has not been subsequently discovered, in spite of the best efforts. A variety of circumstances and facts might account for such conduct on his part. It is not unusual, in the social and cultural climate of this country, for young and impressionable persons, even though they might be well off, to suddenly forsake this world, and to disappear upon some presumed religious or spiritual quest. It is also possible that some elopement, not to the relish of the family, might have been at the back of this behaviour. All that, as learned Counsel for the appellants argues, may be a speculation. But the facts do not warrant the inference that the mere failure of this young man to draw his remittance, is any safe foundation for a presumption of death on or about that time. In my view, the dicta of the English decisions that I have referred to, cannot be applied without qualification and uncritically to such a situation in this country. As far as section 108 of the Indian Evidence Act is concerned, the only conclusion possible is that the young man was dead at the time when the question arose (date of plaint) owing to the failure of the defendant-Corporation to prove that he was alive.

In the result, therefore, this Second Appeal is dismissed, confirming the declaration of the Courts below in the restricted form. It is certainly open to the plaintiffs to advance their claim before the defendant-Corporation for the amounts assured on the policies, including the one policy that is alleged to have lapsed up to the surrender or paid-up value of the policy. I may add that the case appears to deserve sympathetic treatment at the hands of the defendant-Corporation, during any such enquiry. Parties to bear their own costs here.

No leave.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

Veeraswamy Naicker and another .. *Appellants**

v.

Alamelu Ammal and others *Respondents.*

Madras City Tenants Protection Act (*III of* 1922), *section* 2 (4)—*Tenant—Scope of—Tenant continuing in possession after the termination of tenancy—Forfeiture of tenancy by denial of title of landlord—If a tenant within the definition and entitled to protection—Amendment of definition by Amending Act of* 1960—*Scope of.*

The definition of the word 'tenant' in section 2 (4) of the Madras City Tenants Protection Act, 1922, prior to its amendment in 1960, comprised three categories of persons *viz.*, (1) tenant liable to pay rent, (2) every person deriving title from him and (3) persons who continue in possession after the termination of the tenancy. The first envisages the existence of contractual tenancy, the second a derivative title from a tenant of the first category and the third contemplates a person who continues in possession notwithstanding that there has been a termination of the tenancy.

A tenancy may come to an end for a number of reasons one of which is by forfeiture entailed by denial of title of landlord. In such cases there is hardly any room for such a person to claim the protection of the Act as the person claims to be in possession of the property as his own. To such cases the third category of tenants will not apply and they cannot claim the protection of the Act.

Appeal against the Decree of the District Court of Chingleput in Appeal Suit No. 175 of 1960, preferred against the decree of the Court of the District Munsif of Poonamallee in Original Suit No. 556 of 1958.

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*S.A. No. 1598 of 1961. 18th February, 1965.

R. Vaidyanathan, for Appellant.

T. V. Balakrishnan and *N. Vanchinathan*, for Respondent.

When the appeal first came on for hearing before him the following order of reference was made by

Kailasam, J. :—The defendants are the appellants. The plaintiff filed the suit for a declaration of his title and possession. The first defendant took the "A" Schedule property on lease by a rental agreement dated 29th April, 1933, in favour of the plaintiff and his elder brother Srinivasa Pillai on a rent of Re. 1 per month. The tenancy was liable to be terminated by one month's notice. There was a partition between the plaintiff and his brother in 1935 under which the plaintiff became the owner of the nothern half of the suit property described in the plaint "B" Schedule. The first defendant continued to occupy the nothern portion belonging to the plaintiff but surrendered possession of the southern portion to Srinivasa Pillai. The first defendant continued to pay the rent to the plaintiff till about 1952. In 1958 the plaintiff terminated the tenancy by a notice dated 30th June, 1958. The first defendant then set up title in himself, and the plaintiff again sent another notice terminating the tenancy on the ground of the first defendant claiming title to the property.

The first defendant in his written statement contended that he entered into possession of the property about 45 years back. But he did not agree to pay any rent. As the plaintiff asked the first defendant to execute a document, the first defendant executed such a document without knowing its contents. He also executed another document ten years thereafter without knowing its contents. According to the 1st defendant, the plaintiff received from him a sum of Rs. 820 in three instalments agreeing to sell the entire "A" Schedule property. The first defendant also pleaded that in case he fails to prove title to the property in his possession and if he is found to be a tenant, he is entitled to the benefits of the Madras City Tenants' Protection Act. He also pleaded that the suit filed without proper notice as required under the said Act is liable to be dismissed.

The trial Court found that there was no such sale as alleged by the defendants and that the title was with the plaintiff. It also found that even though the defendants have failed to prove their alleged purchase, there was sufficient evidence to show that the first defendant was a tenant under section 2 (4) of the City Tenants' Protection Act and as such entitled to protection under the said Act. It therefore dismissed the plaintiff's suit. On appeal the lower appellant Court negatived the sale set up by the first defendant and found title in favour of the plaintiff. It also found that as the defendants denied the title of the landlord and as the tenancy was terminated, the defendants cannot claim the benefits under the said City Tenants' Protection Act and holding that the first defendant is not entitled to the benefits of the said Act, it decreed the suit.

In this Second Appeal, it is contended on behalf of the defendants that the lower appellate Court was in error in holding that the first defendant was not entitled to the benefits of the City Tenants' Protection Act. The facts found are that by virtue of the lease dated 29th April, 1933, the first defendant entered into the land and continued to be a tenant till his tenancy was terminated by a notice by the plaintiff on 30th June, 1958, forfeiting the tenancy due to the tenant setting up independent title. Section 2 (4) of the City Tenants' Protection Act (Madras Act III of 1922) defines 'tenant' as meaning tenant of land liable to pay rent on it, every other person deriving title from him, and as including persons who continue in possession after the termination of the tenancy. The definition of the word 'Tenant' was amended in 1960, but as the suit was filed in 1958, we are not now concerned with the amendment. The definition of the word "Tenant" includes (*i*) tenant of the land liable to pay rent, (*ii*) every other person deriving title from him and (*iii*) persons who continue in possession after the termination of the tenancy.

As the tenancy of the first defendant was validly terminated in 1958, he was not a tenant. Under clause (1) a tenant is liable to pay rent. The second clause has no application as the 1st defendant does not claim to be a person deriving title

from a tenant. The question is whether the defendant comes under the third clause. Though the tenancy of the defendant had been validly terminated, he continued to be a person in possession after the termination of the tenancy. Under the Transfer of Property Act, lease of immovable property can be determined under one of the clauses enumerated in section 111. Clause (*g*) relates to the determination of tenancy by forfeiture. It is not disputed that the tenancy was validly determined. But clause (*iii*) of section 2 (4) of the City Tenants' Protection Act includes a person whether he be a tenant, or not who continues to be in possession after the termination of the tenancy. The definition is wide enough to include a person who was a tenant but whose tenancy was terminated validly but continued to be in possession after the termination of the tenancy. Mr. Balakrishnan, learned Counsel appearing for the respondent submitted that after the termination of the tenancy validly, the tenant had no right whatsoever and therefore he cannot claim any right under the City Tenants' Protection Act. In support of his contention, he relied on the decision reported in *Madhava Rao Naidu* v. *Sri Gangadeswarar Temple*[1]. In that case it was held that after the tenancy was terminated by notice because of the tenant's denial of landlord's title, a person who purchased in auction the right, title and interest of the tenant was not a tenant. It was also held that it cannot be said that because the tenant was in possession after the termination of the tenancy, he was entitled to pass on the benefit of the Act to the auction-purchaser of his right, title and interest.

Leach, C.J., dealing with this question observed as follows :

"Ponnuswami denied his landlord's title and therefore the landlord was entitled to terminate his tenancy which was done by a notice given to him on 10th September, 1936. He was informed that unless he vacated and delivered vacant possession of the land within three days of the receipt of the notice, proceedings in ejectment would be taken against him. The appellant's purchase of the right, title and interest of Ponnuswami took place two years later. If Ponnuswami had in law any right in this land it would have passed to the appellant but clearly he had none.

The argument of the appellant is that Ponnuswami was in possession after the termination of his tenancy and therefore was entitled to pass on the benefit of the Act to the appellant. It is impossible to accept the argument that a person who claims under a person whose tenancy has been determined is a tenant and is entitled to further notice. When the appellant purported to purchase Ponnuswami's rights, Ponnuswami was not a tenant and therefore could assign no tenancy right to the appellant."

The learned Counsel for the appellant sought to distinguish this case on the ground that the question that arose for consideration in the case was whether the tenant after ceasing to be a tenant could pass on any right to his purchaser. But this case is different as the tenant himself is continuing to be in possession. On the facts of the case before the Bench there could be no difficulty in concluding that a person who derived title from a tenant, whose tenancy had been terminated, may not be entitled to claim the benefit as a tenant under section 2 (4). The observation of the Bench appears to cover the case of tenants who continued to be in possession after the termination of the tenancy for it was stated thus :

" If Ponnuswami had in law any right in this land, it would have passed to the appellant but clearly he had none."

Again in conclusion it was observed as follows :

"When the appellant purported to purchase Ponnuswami's rights, Ponnuswami was not a tenant and therefore could assign no tenancy right to the appellant."

If the remarks of the Bench are to be construed as holding that a tenant continuing in possession after the termination of the tenancy has no rights, it will not be in conformity with the 3rd clause of the definition of section 2 (4) for persons who continued in possession after the termination of the tenancy are included.

In view of the importance of the question, I am of opinion that this matter should be disposed of by a Bench of this Court. The matter is therefore referred to a Bench.

In pursuance of the above order this appeal was heard by a Bench (*K. Veeraswami* and *P. Kunhamed Kutti, JJ.*).

R. Vaidynathan, for Appellant.

T. V. Balakrishnan and *N. Vanchinathan*, for Respondent.

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1. (1946) 2 M.L.J. 285.

The Judgment of the Court was delivered by

*Veeraswami, J.**—The defendants appeal against a reversing judgment arising from a suit for a declaration of the title of the respondents and for recovery of possession of a site measuring 92 ft. by 36 ft. at Adambakkam. On 29th April, 1933, the 1st defendant took a lease of the "A" Schedule property from the plaintiff and his brother on a certain rental. In 1935 at a partition between the brothers, the plaintiff became the owner of the nothern half of the property covered by the original lease. Thereafter the 1st defendant surrendered the southern half but continued to occupy the northern half. Since the lease was terminable by a month's notice, the plaintiff terminated it by a notice dated 30th June, 1958. The 1st defendant then denied the plaintiff's title on the ground that he had purchased the northern half of the site from the plaintiff. The plaintiff by another notice purported to terminate the tenancy on the ground that the 1st defendant denied his title and claimed title in himself. The plaintiff's suit followed, which was resisted on two grounds, (1) title in himself by purchase from the plaintiff, and (2) he was entitled to protection under the provisions of the Madras City Tenants' Protection Act, 1921. Both the Courts below have found against the claim of title by the 1st defendant, but they have differed on the question whether he was entitled to the protection of the Act, the lower Court holding that he was not.

The Second Appeal was originally before Kailasam, J., who considered that if *Madhava Rao Naidu* v. *Sri Gangadeswarar Temple*[1], had decided that a tenant continuing in possession after termination of tenancy had no right, it would not be in conformity with the third clause of the definition of a tenant in section 2 (4) of the City Tenants' Protection Act, 1921. On that view the learned Judge referred the Second Appeal for disposal of by a Division Bench and that is how it comes before us.

The Madras City Tenants' Protection Act was enacted for the express purpose of giving protection to tenants, who in municipal towns and adjoining areas in the State of Madras have constructed buildings on other's lands in the hope that they would not be evicted so long as they paid a fair rent for the land. The 1st defendant would claim to have put up certain huts on the land and sought protection under the Act. Section 9 provides for statutory protection of tenants in possession, as defined by section 2 (4) of the Act. The definition is as follows :

> "2 (4) 'Tenant' means tenant of land liable to pay rent on it, every other person deriving title from him, and includes persons who continue in possession after the termination of the tenancy."

The statutory definition of a tenant includes, therefore, three classes of persons of which the first envisages the existence of contractual tenancy under the terms of which there is a liability to pay rent. The second category is based on a derivative title from a tenant of the first class. The third contemplates a person, who continues in possession notwithstanding the fact that there has been a termination of the tenancy. The 1st defendant claims that he will come under the third category. On the other hand for the plaintiffs the argument is that, where a person has suffered forfeiture by denial of the landlord's title under section 111 (*g*) of the Transfer of Property Act, he will not fall within the purview of the third class of statutory tenant as defined by the Act.

It seems to us that the decision above referred to concludes the point against the defendant and in our view, with respect, it is correct. There a Court auction purchaser of the right, title and interest of one quondam tenant of the property in question claimed that, placed as he was as a purchaser in the shoes of the vendor, who continued to be in possession even after denial of title by him and incurring forfeiture on that account he was entitled to the statutory protection. Sir Lionel Leach, C.J., and Mr. Lakshmana Rao, J., held in the circumstances that, if the vendor had in law any right in the land, it would have passed to the appellant, who was the auction purchaser, but clearly he had none. Mr. Vaidyanatha Iyer for the

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*18th February, 1955.

1. (1946) 2 M.L.J. 285.

appellant argues that the ratio of this decision is merely that the right to statutory protection under the Act is not a transferable or transmissible right. According to him, that is all that the Court decided in that case. We have no hesitation in rejecting the contention for the learned Judges unmistakably pointed out that Ponnuswami, who was the original tenant, clearly had no right in himself, and it was on that account they held that the Court auction purchaser, who claimed his right, title and interest, had acquired no right.

Quite apart from this decision, we are of the view that the lower appellate Court took the right view of the scope of section 2 (4), as it stood before the amendment in 1960. It is true that the third clause in the definition comprehends persons continuing in possession, though the tenancy has come to an end. A tenancy may come to an end for a number of reasons as for instance denial of landlord's title. Such a denial under the ordinary law of transfer of property brings about forfeiture. The argument for the appellant before us is that even such a case will be within the actual words of the third category in the definition. But there is a fallacy in the argument. When a person, who continues to be in possession after termination of tenancy, claims that he does so, as he is entitled to the property, as his own, it is obvious that there is hardly any room for such an owner to seek protection of his possession under the provisions of the Act. Clearly the Act is not intended to protect such owners, for there is no need for it. We are of the view that such a case will not fall within the third category of persons entitled to protection under the Act. On that view, the Second Appeal fails and is dismissed with costs.

R.M. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

S. T. Shanmugham and another .. *Petitioners**

Trade and Merchandise Marks Act (*XLIII of* 1958), *section* 79—*Conviction under—Essentials—Registration of trade mark or trade description not a* sine quo non.

For sale or exposing for sale or for having in one's possession for sale or for any purposes of trade any goods or thing with any false trade mark or false trade description, to be penalised under section 79 of the Trade and Merchandise Marks Act, registration of the trade mark or trade description is not necessary. "Trade mark", as defined in section 2 (*v*) comprises both registered and unregistered trade mark in the use for purpose of Chapter X, other than section 81. No doubt, by registering a trade mark, a person gets title to the mark established and it enables him also to avoid proving his title against any infringer of the mark. But, in the case of an unregistered trade mark the only way in which its owner can protect his title is by means of an action for passing-off where he will have to prove not only title by prior use but also by abundant evidence that the mark is distinctive of the goods in relation to which he has used it and that the defendant has passed off other goods under the same or similar mark. His success in such action thus depends upon his ability to establish that the mark of which he claims ownership as a fact distinguishes his goods from the goods of other traders and that the opponent's mark is such as calculated to lead to such opponent's goods being passed-off as his own

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sixth Presidency Magistrate, Saidapet, Madras, dated 31st December, 1962, and made in C.C. No. 6499 of 1962.

G. Gopalaswami and *V. Gopinathan*, for Petitioners.

N. Srivatsamani, for the Public Prosecutor on behalf of the State.

The Court made the following

ORDER :—This Revision Case is directed against the conviction and sentence of fine of the two petitioners by the Sixth Presidency Magistrate, Saidapet, under section 79 of the Trade and Merchandise Marks Act.

The facts of this case are somewhat peculiar. The two petitioners are said to be doing beedi business at 1/7, Narayanappa Garden Street, Washermanpet. But, they were found in possession of beedi bundles bearing the trade marks

*Crl.R.C. No. 1020 of 1963. (Crl. R.P. No. 977 of 1963) 13th July, 1964.

of the Kareem Beedi Factory, which, according to the prosecution, being for purposes of trade with a false trade mark was culpable both under section 420 read with section 511, Indian Penal Code, and under section 79 of the Trade and Merchandise Marks Act of 1958.

Exhibit P-20 is the complaint made by Abdul Kareem and Company, Manufacturers of the Kareem Beedi. In the course of investigation into this complaint, the Sub-Inspector (P.W. 1) traced the two petitioners who are brothers and searched their house as per the search list Exhibit P-1, when he is said to have recovered bogus beedi bundles, ring labels, belly labels etc. He further found on a close scrutiny that these labels are imitations of Kareem Beedi labels. It was proved through P.W. 5 that labels seized from the petitioners were bogus ones. P.W. 4, a servant of the petitioners for pasting labels, deposed that she pasted Exhibits P-9 and P-15 the ring labels taking them to be Kareem Beedi labels as they looked like Kareem Beedi labels. A scrutiny of these labels with the genuine Kareem labels further revealed the printing of the latter labels to be much clearer as compared to the former. Again while Kareem beedi ring labels were printed on full size paper and contained 1,500 labels, the bogus ones were printed in quarter sheets and contained only 300 labels. There were also differences in the wrapper used for genuine Kareem Beedi bundles and packets and the ones used by the petitioners ; and P.W. 5 swore that the different labels of Kareem beedi have also been registered under the Trade Marks Act.

The petitioners appear to have denied *in toto* the charges brought against them. According to the first petitioner, the properties produced in Court were recovered from other places and not seized form his house. He would say that they were placed in his courtyard to make it appear that they had been seized from him while, as a matter of fact, he has no connection with beedi business. The second petitioner claimed to be the Secretary of the Madras Beedi Workers' Union and conceded that his brother, one Ramadas, was carrying on a beedi business. He was implicated in the case because of the trouble between Ramadas and Kareem Beedi management. And, to make out the plea that the petitioners were not doing beedi business and the beedies concerned in the case were taken from the house of Ramadas, they examined as many as four witnesses, D.Ws. 1 to 4.

The learned trial Magistrate has discussed the entire evidence in the case, oral and documentary and has come to the conclusion that the only culpable offence committed by the petitioners was under section 79 of the Trade and Merchandise Marks Act.

Section 79 is to the effect that :

"Any person who sells, or exposes for sale, or has in his possession for sale or for any purpose of trade or manufacture, any goods or things to which any false trade mark or false trade description is applied......shall, unless he proves—

(*a*) that, having taken all reasonable precautions against committing an offence against this section, he had at the time of the commission of the alleged offence, no reason to suspect the genuineness of the trade mark or trade description or that any offence had been committed in respect of the goods; and

(*b*) that, on demand by or on behalf of the prosecutor, he gave all the information in his power with respect to the person from whom he obtained such goods or things ; or

(*c*) that otherwise, he had acted innocently; be punishable with imprisonment for a term which may extend to two years, or with fine or with both."

The proviso to the section is omitted as unnecessary.

The trial Magistrate has found on the evidence that the petitioners have not succeeded in bringing the case under the one or the other of clauses (*a*), (*b*) or (*c*). On the other hand, he found on the combined testimony of the Sub-Inspector, (P.W. 1), Gunabhushanammal (P.W.4) and the representative of Kareem Beedi Factory (P.W.5) that the bogus labels Exhibits P-9, P-15 and the bogus M.Os. marked in the case used to be utilised to pass-off beedies made for the petitioners as Kareem beedies.

Sri Gopalaswami for the petitioners has however taken me through the relevant definitions and provisions of the Act in an attempt to make out that since Kareem Beedi mark was not in the Register of Trade Marks kept under section 6 of the Act and had not been registered under the present Act, no offence punishable under section 79 (which is not punishable under the Trade Marks Act of 1940) can be said to have been committed by the petitioners. The Trade Marks Act of 1940 has been superseded by the present Trade and Merchandise Marks Act (XLIII of 1958) which came into force on 25th November, 1959. Section 50 of this Act reads thus :—

> "Notwithstanding anything contained in any law for the time being in force or in any contract or agreement, every registration made before the commencement of this Act of a registered user shall cease to have effect after the expiration of three years from such commencement."

There is no evidence in the case that subsequent to the expiry of the period of registration of the Kareem Beedi marks, they had been renewed or that their trade marks are in the Register of Trade Marks kept in the Trade Marks Registry Office, either in Part-A or Part-B Register.

The question nevertheless is whether registration is a *sine quo non* for action under section 79 of the Act. 'Trade Mark' as defined in section 2, clause (*v*) means:

> "(i) in relation to Chapter X which deals with offences, penalties and procedure—(other than section 81), a registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark ; and
>
> (ii) in relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user to use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark registered as such under the provisions of Chapter VIII.

Trade description as defined in clause (*u*) of section 2 means any description, statement or other indication direct or indirect (*inter alia*) as to the name and address or other indication of the identity of the manufacturer or of the person for whom the goods are manufactured; and 'fase trade description' as defined in section 2 (*f*) means a trade description which is untrue or misleading in a material respect as regards the goods to which it is applied; or, in *inter alia* any marks or arrangement or combination thereof applied to goods in such manner as to be likely to lead persons to believe that the goods are the manufacture or merchandise of some person other than the person whose merchandise or manufacture they really are ; or, any false name or initials of a person applied to goods in such manner as if such name or initials were a trade description, in any case where the name or initials......is or are identical with or deceptively similar to the name or initials of a person carrying on business in connection with goods of the same description and who has not authorised the use of such name or initials—*vide*, clauses (*f*) (iv) and (v) (*b*).

It would thus appear that for sale or exposing for sale or for having in one's possession for sale or for any purposes of trade any goods or thing with any false trade mark or false trade description, to be penalised under section 79 of the Act, registration of the trade mark or trade description is not necessary. "Trade mark" as now defined, comprises both registered and unregistered trade mark in the use for purpose of Chapter X, other than section 81. No doubt, by registering a trade mark, a person gets title to the mark established and it enables him also to avoid proving his title against any infringer of the mark. But, in the case of an unregistered trade mark the only way in which its owner can protect his title is by means of an action for passing-off where he will have to prove not only title by prior use but also by abundant evidence that the mark is distinctive of the goods in relation to which he has used it and that the defendant has passed-off other goods under the same or similar mark. His success in such action thus depends upon his ability to establish that the mark of which he claims ownership as a fact distinguishes his goods from the goods of other traders and that the opponent's mark is such as calculated to lead to such opponent's goods being passed-off as his own.

In this case, the evidence of P.W. 5 is precise and definite that the labels got printed by the petitioners are false trade marks and that their intention was to pass-off the beedies manufactured by them as those manufactured by Kareem Beedi Factory. To that extent the case has been clearly proved. The conviction of the petitioners under section 79 of the Trade and Merchandise Marks Act is, in the circumstances unassailable.

The convictions are, therefore, confirmed and the sentence being only one of fine of Rs. 100 each, does not call for interference.

The petition is accordingly dismissed.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

M. A. Abdul Rahim and Mohamed Ibrahim and Co. .. *Petitioner**

v.

The Deputy Commercial Tax Officer, Gudiyatham .. *Respondent.*

Madras General Sales Tax Act (*I of* 1959), *sections* 24 (3) *and* 61—*Scope—Arrears of sales tax accrued before the Act came into force—Levy of penal interest under section* 24 (3)—*Propriety.*

Penal interest under section 24 (3) which the Madras General Sales Tax Act, 1959 alone contemplated but not the old Act, namely the Madras General Sales Tax Act, 1939, cannot be imposed retrospectively in respect of an arrear of sales tax imposed under the old Act and which became due before the Madras General Sales Tax Act, 1959 came into force. There is nothing in the transitory provision in section 61 of the Madras General Sales Tax Act, 1959 to justify such a levy, the levy of penalty being not a method of recovery of an arrear. The proper way of looking at the amount is to treat it as a liquidated sum for damages for the period for which the State is kept out of the money to which it is entitled. Levy of such an amount cannot by any stretch of interpretation be treated as a process of recovery of an amount due.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Order-Penalty Register No. 329/62-63 in Assessment No. 2381/50-51 dated 3rd November, 1962, for the year 1950-51 on the file of the Deputy Commercial Tax Officer, Gudiyatham, and quash the said order and made therein.

M. R. M. Abdul Karim, for Petitioner.

S. Mohan, for the Additional Government Pleader on behalf of the Respondent.

The Court made the following

ORDER.—The point for decision in this writ petition is a short one. It is the propriety of levy of interest for default in payment of arrears of sales tax under section 24 (3) of the Madras General Sales Act, 1959, in relation to an arrear of a sales tax which accrued before that Act came into force.

A few facts will be helpful to understand the question raised for decision in this case. For the year 1950-51 the petitioner was assessed to sales tax by an order of the assessing authority passed on 29th March, 1952. The demand notice for the tax thus levied was served on him on 9th April, 1952. The demand notice specified a period of 21 days for making the payment. In the Madras General Sales Tax Act of 1939 then in force there was no provision for levy of any interest by way of penalty on tax not paid within the time specified in the notice of demand. In the Madras General Sales Tax Act of 1959, however, section 24 (3) had such a provision in the following terms :

"If the tax assessed under this Act or any instalment thereof is not paid by any dealer or person within the time specified therefor in the notice of assessment or in the order permitting payment in instalments, the dealer or person shall pay by way of penalty, in addition to the amount due a sum equal to

*W.P. No. 1391 of 1962. 21st October, 1964.

(a) half a per cent of such amount, for each month or part thereof for the first three months after the date specified for its payment :

(b) One per cent of such amount, for each month or part thereof subsequent to the first three months aforesaid. "

The Department issued an order on 3rd November, 1962, to the petitioner stating that, as he had not paid the arrears of the tax assessed on him for 1950-51 within the period specified in the notice, he was liable to pay by way of penalty interest calculated for 40 months under the provision of section 24, sub-section (3) of the Madras General Sales Tax Act, 1959, for an amount of Rs. 1,455-65. The petitioner contends that the Madras General Sales Tax Act of 1959 would not have any retrospective effect for the purpose of levying penal interest under section 24 (3) in regard to arrears accrued before the Act, and therefore the order of the authority was *ultra vires* and requires to be quashed by a writ of *certiorari*.

I am of opinion that the contention of the petitioner is right. I have just now mentioned that the Madras General Sales Tax Act of 1939 which was in force at the time when the assessment order was passed and also at the time, when it became an arrear when it was not paid within 21 days as required under the notice of demand did not contain a provision for levy of interest by way of penalty. Learned Government Pleader appearing for the respondent, Commercial Tax Officer, relied upon the transitory provision enacted in section 61 of the Madras General Sales Tax Act of 1959 for supporting the demand. The transitory provision is in the form, which is usually found, where there is a repealing and a re-enacting piece of legislation, as in the case of the Madras General Sales Act of 1959. Section 61 reads:—

" *Repeal.*—(1) The Madras General Sales Tax Act, 1939 (Madras Act IX of 1939) is hereby repealed :

Provided that such repeal shall not affect the previous operation of the said Act or any right, title, obligation or liability already acquired, accrued or incurred thereunder and subject thereto, anything done or any action taken including any appointment, notification, notice, order, rule, form, regulation, certificate, licence or permit in the exercise of any power conferred by or under the said Act, shall be deemed to have been done or taken in the exercise of the powers conferred by or under this Act, as if this Act were in force on the date on which such thing was done or action was taken, and all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act. "

It is on the Proviso to this section and in particular on the last part of it, which reads, " all arrears of tax and other amounts due at the commencement of this Act may be recovered as if they had accrued under this Act ", that the learned Government Pleader relies for supporting the impugned order. It is plain that, though there was an arrear of tax due by the petitioner at the commencement of the Madras General Sales Tax Act, 1959, the interest levied on him by way of penalty was not an amount due from him at the commencement of that Act. Because as I have already said, such an amount was not leviable under the provisions of the pre-existing Act of 1939. Learned Government Pleader wanted to read in the clause, " may be recovered as if they had accrued under this Act" a power also to levy interest by way of penalty under section 24 (3). But I have not been shown any authority by the learned Government Pleader to support the view that the levy of penalty by way of interest is a method of recovery of an arrear. The proper way of looking at the amount is to treat it as a liquidated sum for damages for the period for which the State is kept out of the money to which it is entitled. Levy of such an amount cannot by any stretch of interpretation be treated as a process of recovery of an amount due. Therefore, support for the impugned levy cannot be found in any of the clauses of the transitory provision in section 61 of the Madras General Sales Tax Act, 1959, much less in the concluding clause of the proviso above referred to and which is relied upon by the Government Pleader.

The learned Government Pleader quoted the decision of the Supreme Court in *Income-tax Commissioner* v. *M/s. Bhikaji Dadabhai*[1]. In that case an amount of

1. (1962) 1 S.C.J. 554 : A.I.R. 1961 S.C. 1265.

income-tax was due as an arrear under an earlier Hyderabad Income-tax Act, which was in force and that Act provided also for the levy of the penal interest. What the decision laid down was that even after Indian Income-tax Act was extended to the former Hyderabad territory the proceedings for the collection of penalty already levied under the pre-existing enactment, could be continued by virtue of the transitory provision. There is also the observation in the same judgment that penalty is to be regarded as an additional tax levied in the case of contumacious action. The above observation in the decision would support the contention of the petitioner in so far as he claims that the penal interest in this case was a levy of an amount in addition to the arrear of tax which was due on the date of the commencement of the Act of 1959, and that it is not a levy, which can be related to the process of recovery. Learned Counsel for the petitioner referred to the decision in *Mathew* v. *Second Additional Income-tax Officer*[1], where there is an observation at page 459—no doubt in some other context under the Indian Income-tax Act,

> " It is impossible to consider that the imposition of penalty is also a mode of recovery of tax. "

In my opinion no authority is really necessary for the clear position that the penalty levied in this case, which the new Act alone contemplated but not the old Act, cannot be imposed retrospectively in respect of an arrear of sales tax, which became due before the new Act, and that nothing in the transitory provision in section 61, will justify its levy. The writ petition is therefore allowed and the impugned order is quashed by a writ of *certiorari*. The rule *nisi* is made absolute.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

A. P. Ismail Rowther .. *Petitioner**

v.

Mymoon Bivi and others .. *Respondents.*

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 90—*Application to set aside sale on grounds of material irregularity and fraud—Inherent jurisdiction of Court to set aside sale—Petitioner and another, rival decree-holders against same judgment-debtor—Purchase and possession of properties of judgment-debtor by petitioner long prior to attachment by rival decree-holder—Attachment of those properties in the possession of petitioner*—Locus standi *of the petitioner to apply for setting aside sale.*

The Court has an inherent jurisdiction to set aside a sale under Order 21, rule 90, on grounds of material irregularity and fraud by the decree-holder or the judgment-debtor in bringing the properties to sale, whether the petitioner had *locus standi* or not to file an application for setting aside the sale.

No doubt the petitioner who had obtained decrees against the same judgment-debtors did not choose to proceed in execution to attach the properties. But he had purchased long prior to the attachment by the rival decree-holder some properties of the judgment-debtor and was in possession thereof. The rival decree-holder had attached those properties in the possession of the petitioner as well. If the other properties of the judgment-debtor were sold for valuable price and the sale-proceeds were enough to satisfy the decree amount due to the rival decree-holder, then the property of the petitioner would be safe from harassment or further execution proceedings. The petitioner is, therefore, vitally interested and in his own interest he must set aside the sale on grounds of illegality and fraud. His interests are not hypothectially and remotely affected by the sale but are directly and immediately affected by the sale.

Petition under section 115 of Act (V of 1908) praying the High Court to revise the Order of the Court of the District Judge of Tirunelveli dated 1st October, 1963, and passed in A. A. O. No. 80 of 1962 (E.A. No. 323 of 1962 in E.P. No. 334 of 1961 in O.S. No. 105 of 1950, District Munsif's Court, Tirunelveli).

S. Rajarama Iyer, for Petitioner.

S. V. Rama Iyengar, for Respondents.

The Court made the following

ORDER.—This Revision Petition arises out of execution proceedings in O.S. No. 105 of 1950. The learned District Judge refused to set aside the sale of the attached properties in the above execution-proceedings, thereby reversing the order

1. A.I.R. 1956 T.C. 184 : 29 I.T.R. 456, (459).

*C.R.P. No. 1772 of 1963. 28th October, 1964.

of the District Munsif setting aside the sale on grounds of material irregularity and fraud in the conduct of the sale. The brief facts necessary for the disposal of this petition are as follows :

The Petitioner herein is a third party decree-holder. He had obtained decrees in O.S. No. 162 of 1960, in S.C. No. 172 of 1951 and in S.C. No. 455 of 1955 against one Pakkiri Moideen Rowther. The second respondent is another rival decree-holder in O.S. No. 105 of 1950 on the file of the District Munsif, Tirunelveli against the said Pakkiri Moideen Rowther. The petitioner filed execution petitions in the abovesaid three suits, but he did not pursue the execution proceedings, as he did not comply with the orders of the Court. While, so, the decree-holder in O.S. No. 105 of 1950, Rangaswami Naidu, filed E.P. No. 334 of 1961, out of which this Revision Petition has arisen, and brought items 1 to 23 for sale after attachment not only of the said items but also several other items belonging to the judgment-debtor. In the Court-auction sale, items 1 to 23 were purchased by the first respondent herein, Mymoon Bivi, the wife of the judgment-debtor for a sum of Rs. 1,505, subject to a *othi* for Rs. 2,500. Soon after the purchase, the said Mymoon Bivi mortgaged item 6 of the properties for a sum of Rs. 2,800 under Exhibit A-1. Now that petitioner filed the application under Order 21, rule 90, Civil Procedure Code, to set aside the sale, on the ground that the properties would be worth more than Rs. 5,000 that there was no proper publication of the sale proclamation, that respondents 2 and 3 herein had colluded with the first respondent herein, that the judgment-debtor had fraudulently purchased the properties in his wife's name for a very low price, that the sale was not valid in law and that therefore the sale must be set aside. The petitioner's contention is that he is interested in the properties as he had already obtained decrees against the judgment-debtor and therefore he is affected.

The learned District Munsif came to the conclusion that there was no proper sale proclamation as required by Order 21, rules 54 (2), 65 and 67 (1) of the Code of Civil Procedure, that the judgment-debtor, the third respondent herein, had so fraudulently arranged to purchase the properties in Court auction in the name of his wife for his own benefit for a very inadequate price and that the petitioner herein had *locus standi* to file the application. On those findings, the learned District Munsif set aside the sale held on 6th October, 1961.

On appeal the learned District Judge of Tirunelveli reversed the findings of the District Munsif and came to the conclusion that the sale was not hit by any material irregularity or fraud, that the property was sold for good consideration and that the petitioner had no *locus standi* to file the application for setting aside the sale. On those findings, the learned District Judge dismissed the application of the petitioner. It is against this order the Revission Petition has been filed.

The points for consideration in this petition are: (1) whether the Court has not inherent jurisdiction to set aside a sale on grounds of material irregularity and fraud practised upon either by the decree-holder or the judgment-debtor, in bringing the properties to sale, and (2) whether the petitioner is directly and immediately interested in the properties brought to sale.

Learned Counsel for the petitioner cited a number of decisions. In *Raghavachariar* v. *Murugesa Mudaliar*[1], it has been held that Order 21, rule 92 of the Code of Civil Procedure does not oust the inherent power of a Court to interfere to cancel the sale, even though no party has applied for cancellation when the Court discovers in the course of the proceedings that the decree-holder deliberately misled it and profited thereby to the disadvantage of the judgment-debtor or the judgment-debtor's creditors. In *Punjab Mercantile Bank* v. *Kishan Singh*[2] a person who had not even obtained a decree filed an application for setting aside a sale, on the ground that he was very eager to purchase the property, that he had offered to purchase the property for Rs. 20,000, but suddenly without his knowledge the property was sold for a very low sum of Rs. 5,000 and that he was ready and willing to purchase the property for the sum offered by him. Now, the Court had to consider whether that person had any *locus standi* to bring the application. The Punjab High Court held:

1. (1923) 44 M.L.J. 680. 2. A.I.R. 1963 Pun. 230.

"Even if the person who brought to light the fraud had no *locus standi* either under section 47 or Order 21, rule 90, the Court had an ample reserve of inherent powers to satisfy itself *suo motu* that its process had been abused. Because the source of information happened to be a person who had no *locus standi*, the Court could not close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud had been perpetrated and its process had been abused."

It is clear from the two decisions cited above that the Court has got inherent powers to set aside a sale, even though the petitioner had *locus standi* or not to file an application for setting aside the sale.

The next point is whether the petitioner is directly and immediately interested in the properties sold in the course of the execution proceedings. It is a common fact that he is a rival decree-holder as against a common judgment-debtor. It is also an admitted fact that he filed execution application in three suits, though he did not pursue the matter, since he did not comply with the orders of the Court. He has also purchased some items of properties from the judgment-debtor long before the decree-holder in O.S. No. 105 of 1950, the second respondent herein, attached items 1 to 23. The purchases are admittedly purchases by the wife of the judgment-debtor for a low sum of Rs. 1,505 subject to an *othi* for a sum of Rs. 2,500.

Adverting to the case-law on the point, in *Narayanan* v. *Pappayi*[1] the question arose whether the fourth defendant had *locus standi* to file the application and whether he was a person whose interests were affected by the sale. The fourth defendant purchased item 1 of the property which was directed to be sold after items 2 and 3. After the Court sale of items 2 and 3, the legal representative of the fourth defendant filed an application under Order 21, rule 90 of the Civil Procedure Code to set aside the sale on the ground of irregularity and fraud. The learned Judge (Srinivasa Aiyengar, J.) held :

"The mere fact that a person is a creditor of a judgment-debtor is not sufficient to show that he would be affected by any sale of the property of the judgment-debtor. It depends upon the solvency of the judgment-debtor. It may depend upon various other matters. But expression used by the Legislature being 'interested', it must be taken to mean directly or immediately interested, an even so construed it is clear that 4th defendant's legal representative is a person that is directly interested and even immediately interested in the price realised by the sale and therefore a person directly and immediately affected by the sale."

In *Ayyappa* v. *Kasiperumal*[2] the petitioner attached certain properties before judgment and in due course obtained a decree ; but before the date of that decree, the attached properties were sold in execution of a decree obtained by another creditor. As soon as the petitioner obtained his decree, he filed an application under Order 21, rule 90, to set aside the execution sale. The Full Bench, following the principle laid down in *Narayanan* v. *Pappayi*[1] that the Legislature intended to confer the right to apply, on any one who was directly and immediately affected by the sale, held that a person who had obtained an attachment before judgment was a person whose interests were affected within the meaning of Order 21, rule 90, of the Civil Procedure Code, when the property attached had been sold in execution of a decree obtained by another person. In *Murugappa* v. *Kannammal*[3] the question was whether a creditor who had obtained a decree against a debtor whose property had been sold in execution of a decree obtained by another creditor could apply to have the sale not set aside under Order 21, rule 90 of the Code of Civil Procedure. Of course, if the applicant was not only the holder of another decree but also had applied for rateable distribution, then he would have the right to apply; but in the case before the Division Bench, admittedly the decree-holder who was the appellant before them had not taken any step in execution. The Division Bench held that he would not, therefore, be a person entitled to share in the rateable distribution of assets. The only question that remained for consideration of the Division Bench was whether he could be said to be a person whose interests were affected by the sale. Explaining the decision of the Full Bench in *Ayyappa* v. *Kasiperumal*[2] the

1. (1927) 53 M.L.J. 229.
2. (1939) 1 M.L.J. 163 : I.L.R. (1939) Mad. 374 (F.B.).
3. (1959) 2 M.L.J. 561: I.L.R. (1959) Mad. 145.

Division Bench consisting of Rajamannar, C. J. and Ganapatia Pillai, J., observed as follows :

> "The words are indeed very wide and on a literal construction of the words not only decree-holders but even ordinary creditors who have not yet sought to enforce their claims can be said to be affected by the sale of any of the properties of their debtor. Indeed anyone who has a prospective claim which can be satisfied by a sale of any of the properties of a person against whom he has the claim can be said to be a person whose interests are affected by the sale of such property. We have no hesitation in holding that this wide construction was not contemplated by the words. The interests which are alleged to be affected by the sale should be interests which are directly and immediately likely to be affected and not interests which may hypothetically and remotely be affected by the sale."

Now, the learned Counsel for the respondents wants to make a distinction. Here the petitioner, except obtaining decrees against the judgment-debtor, did not even attach the properties. He did not pursue his execution applications. He was not at all entitled to rateable distribution, if he filed application in the execution proceedings. There is apparently some force in the argument advanced by learned Counsel for the respondents. Still, I think the petitioner has got *locus standi* to file the application under Order 21, rule 90 of the Civil Procedure Code. He filed execution applications in the suits but he did not pursue them, as he failed to comply with the orders of the Court. But before the decree-holder in O.S. No. 105 of 1950 brought items 1 to 23 for sale, the decree-holder also attached some items of property which are admittedly in the possession of the petitioner which he purchased from the judgment-debtor long before the attachment effected by the decree-holder, the second respondent herein. He is, therefore, vitally interested in setting aside the sale. If the second respondent-decree-holder is not able to realise his decree amount by sale of items 1 to 23, he has got to bring the attached properties which are now in the possession of the petitioner for sale for the balance of the decree amount. The petitioner is, therefore, vitally interested and in his own interest, he must set aside the sale on grounds of illegality and fraud. Now if the property is sold for valuable consideration and the sale-proceeds are enough to satisfy the decree amount, then the property of the petitioner would be safe from harassment or further execution proceedings. Therefore I feel that the petitioner is interested in setting aside the sale. His interests are not hypothetically and remotely affected by the sale but are directly and immediately affected by the sale. The question that follows for consideration is whether the property is sold for proper consideration. It is an admitted fact that items 1 to 23 were sold for a sum of Rs. 1,505 subject to a mortgage. The first respondent herein, who purchased the properties, did not pay the amount immediately. She mortgaged one item of property under Exhibit A-1 for a sum of Rs. 2,800 and then she paid the sum of Rs. 1,505 the sale price, fetched in Court auction for items 1 to 23. Learned Counsel for the petitioner contended that, when item 6 has fetched Rs. 2,800, it is impossible to hold that the items 1 to 23 have been sold for an adequate price. The learned District Judge did not consider whether the property was sold for adequate consideration. He stated that no one would be prepared to purchase the properties in Court auction, paying the market value for the properties. Further, there seems to be some unseemly haste in bringing the properties to sale. And the properties were purchased by the wife of the judgment-debtor. There is no evidence about the exact market value of the properties brought to sale in the Court-auction. The order of the District Judge cannot therefore be sustained.

In the result, the Civil Miscellaneous Appeal is remanded to the file of the District Court, Tirunelveli, for fresh disposal according to law and in the light of the observations contained in this judgment.

V. S. *Matter remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

S. R. Srinivasan and another .. *Petitioners**

v.

The Accommodation Controller, Madras .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 3 (10) (c)—Scope —Section has only prospective operation—Does not affect lawfully created tenancies under Madras Act XXV of 1949.

Where part of a building has been taken over by the Government under the Madras Buildings (Lease and Rent Control) Act (XXV of 1949) and thus Government became a statutory tenant under section 3 (5) of that Act, that tenancy does not come to an end as soon as the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) which repealed and replaced the Madras Act XXV of 1949, came into force, merely because the continued occupation of the building by the Government is opposed to section 3 (10)(c) of Madras Act XVIII of 1960. To all intents and purposes the operation of section 3 (10) of the new Act can only be prospective and cannot affect lawfully created tenancies under the repealed Act. The Government will continue to be the tenant and will be entitled to the protection of the various provisions of the new Act.

It is true that section 35 of the new Act which contains the saving provision does not in terms deal with the rights created under the repealed Act. But in order to understand whether the rights created under the old Act are maintained or not, it is not this saving provision alone that should be looked into but the scheme of the entire Act. It is clear from the scheme of the new Act that the protection that had been given to the tenants of the premises by various sections of the old Act are undoubtedly maintained intact under the new Act. Therefore, a tenancy which was created through the machinery of the old Act continues to be a valid tenancy under the new Act, and cannot be terminated except in accordance with the provisions of the new Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed with each of the petitions, the High Court will be pleased to issue writs of *certiorari* calling for the records of the respondent in A. 9/21541/62 relating to premises No. 3/98, Vasudevapuram, Madras, and in A. 6/25651/62 relating to premises No. 26, Pycrofts Road 1st Street, Royapettah, Madras, and quash the orders dated 5th October, 1962 and 26th November, 1962 and made therein respectively.

M. A. Srinivasan, for petitioner.

K. S. Bakthavatsalam, for the Additional Government Pleader on behalf of respondent.

The Court made the following

ORDER.—The petitioners in these cases are the owners of two different premises. In the case of the first petitioner, a part of his premises was taken over by the Government under the provisions of the Madras Buildings (Lease and Rent Control) Act, 1949, for the purpose of providing accommodation to an officer of the Government. This was in 1952. In the case of the other petitioner, part of his premises was so taken over in 1954. The Act referred to was repealed and a new Act was passed in 1960. After the passing of the new Act, the Government purported to allot those portions of the two houses to some other officers, the earlier occupants having vacated. The petitioners contend that by virtue of a particular provision in the new Act, it is not open to the Government to continue to be in possession of the premises and that the premises should therefore be handed back to them. They seek the issue of writs of *certiorari* to quash the orders of allotment that have been made by the Accommodation Controller in this regard.

The facts are not in dispute. That portions of these buildings were taken by the Government for the occupation of the officers and those portions have been allotted to Government officers in succession is admitted. But the contention that has been taken by the respondent, the Accommodation Controller, is that the premises so taken over continue to be subject to the provisions of the Act and that the new Act does not contain any provision which releases the premises from the

*W.P. Nos. 1292 and 1359 of 1962. 1st December, 1964.

tenancy created under the old Act. In order to appreciate the contentions, a brief reference has to be made to the provisions of the two Acts.

Under section 3 (5) of the old Act, where any vacancy occurred, notice of such vacancy had to be given to the Accommodation Controller. Under section 3 sub-section (3), if the building was required for the purposes of the State or for the occupation of any officer of the State Government, the Accommodation Controller could within ten days of the receipt of the notice of vacancy intimate the landlord accordingly. On his doing so, sub-section (5) provided

"The State Government shall be deemed to be the tenant of the landlord with retrospective effect from the date on which the authorised officer received notice........"

By this provision, the Government became the tenant of the premises; and since the premises were taken over for the occupation of its officers, the Government became entitled to allot the premises to any officer in its employ. If any such officer so placed in occupation of the premises ceased to require it, since the Government was the tenant, the tenancy did not cease when the officer vacated it. The Government could allot it to another officer in need of the rental accommodation. It is not in dispute that the premises were being so allotted from officer to officer as and when occasion arose.

When the 1949 Act was repealed and replaced by Madras Act XVIII of 1960 a new sub-section was introduced. The several sub-sections of section 3 of the new Act which are almost identical with those of the old Act also deal with the notice of vacancy and the taking over of the building by the Accommodation Controller for the purpose of Government or any of its officers and other like purposes. Sub-section (10) was newly introduced which reads thus in so far as it is material to the present case :

"Nothing contained in this section shall apply—

....

(c) to a residential building, a part only of which is occupied by the full owner and the whole or any portion of the remaining part of such building is let to any tenant."

What this sub-section provides for is that in a case where a part of a building which had been in the occupation of a tenant fell vacant, the remaining portion, the whole or part of it being under the occupation of the owner himself, it was not necessary for the landlord to give a notice of vacancy as required by section 3 (3) of the Act. Obviously, if no notice of the vacancy was required to be given in such a case it followed that the Accommodation Controller could not take any steps in regard to that part of the building for the purposes of the State Government or for the occupation of any of the officers of the State Government. This is apparently some relief that was given to the landlords who were in occupation of a part of their own houses and who had let out other parts of their houses, and was presumably intended to avoid the creation of statutory tenancies over parts of such buildings. It is the contention of Mr. M. A. Srinivasan, learned Counsel for the petitioners, that the right of the Government to continue as a tenant after the repeal of the 1949 Act and the re-enacting of Act XVIII of 1960 has not been saved It is also claimed that the Government was only deemed to be the tenant of the premises and such a deemed tenancy cannot survive the repeal of the Act.

The real purport of the contention of the petitioner is that the Act itself is no longer applicable, for what is demanded by the petitioners is that on the repeal of the old Act, the statutory tenancy created by section 3 (5) of the old Act came to an end and that the Government is no longer entitled to be in occupation of the premises. But that is not the real effect of the provision. Looking at the scheme of the Act, it is easy to see that the protection that had been given to the tenants of premises by various other sections of the old Act are undoubtedly maintained intact under the new Act. For instance, section 10, which provides for eviction of tenants prohibits the eviction of a tenant except in accordance with the provisions of the Act and a tenant as defined in the Act does not exclude a deemed tenant, such as the Government in the present instance. What section 3 (10) provides

for is only to relax the requirement of giving notice of vacancy in certain classes of cases.

It is true that section 35 which contains the saving provision does not in terms deal with the rights created under the old Act. Section 35 (2) (*a*) only provides that all orders made or deemed to have been made under the old Act shall be deemed to have been made under the corresponding provision of the new Act and shall have effect accordingly. But in order to understand whether the rights created under the old Act are maintained or not, it is not this saving provision alone that should be looked into but the scheme of the entire Act. In a decision of the Andhra Pradesh High Court in *State of Andhra* v. *Ramaswami*[1] the learned Judges observe that when an Act is repealed, the provisions of the new law should be examined to see whether they

> " disclose the legislative intent to destroy the rights that have accrued or the liabilities that were incurred under the old Act or to terminate the proceedings that were initiated before the law was altered or to take away all its precedent effects. "

In *The State of Punjab* v. *Mohar Singh*,[2] their Lordships observe that when a repeal is followed by fresh legislation on the same subject, the Court will have to look to the provisions of the new Act for the purpose of determining whether they disclose a different intention, for, normally, on the repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act would follow. They also say that the line of enquiry should not be whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them, and this will have to be ascertained from a consideration of all the provisions of the new law and the absence of a saving clause in the Act would not by itself be material. Assuming therefore that there is no express saving of any rights that accrued under the old Act, it does not follow according to the decision that those rights are deemed to have been destroyed. The provisions of the Act have to be examined in that regard and the one instance, that I have referred to, namely, the protection against eviction of tenants in whatsoever manner they may have come into possession of the premises is sufficient to show that a tenancy, which was created through the machinery of the old Act, continues to be a valid tenancy under the new Act, which cannot be terminated except in accordance with the provisions of the new Act. It obviously follows that the rights created under the old Act are not intended to be destroyed by the new Act solely by reason of the introduction of section 3 (10). To all intents and purposes, the operation of section 3 (10) of the Act can thus be only prospective and it cannot affect lawfully created tenancies under the old Act.

I am accordingly satisfied that the petitioner's contention that the continuance of the occupation of these premises by the Government is opposed to section 3 (10) (*c*) of the Act and that they are entitled to be replaced in possession of their premises must fail. The Government continue to be the tenant and are entitled to the protection of the various provisions of the Act. There is no question of the occurrence of any vacancy, that is to say, the termination of the tenancy which alone may perhaps give rise to the new right created by section 3 (10) (*c*). The petitions accordingly fail and are dismissed. There will however be no order as to costs.

V.K. *Petitions dismissed.*

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1. (1958) 2 An.W.R. 79.

2. (1955) S.C.J. 25 : A.I.R. 1955 S.C. 84.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

A. R. Sanjeevi Naicker .. *Appellant**

v.

P. M. Shanmuga Udayar .. *Respondent.*

Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948) as amended by Madras Act (XLIV of 1956), sections 11 and 64-C—Effect of section 64-C—Grant of patta under section 11 in respect of lands taken over by Government—If operates as bar to civil Court adjudicating upon competing titles to such lands.

Limitation Act (IX of 1908), sections 4, 28 and Article 144—12 years period of adverse possession under Article 144 expiring on Sunday—Suit for possession on succeeding Monday—If barred.

The issue of a patta in respect of lands taken over under the Madras Estates (Abolition and Conversion into Ryotwari) Act (XXVI of 1948), under section 11 of the Act would not take away the jurisdiction of a civil Court to adjudicate upon competing titles to such lands. Section 64-C of the Act has no such effect. Only when the Revenue Authorities can grant particular relief their decisions would become final to that limited extent. But if the Revenue Authorities cannot grant a particular relief, namely, relief of possession and declaration of title or relief of injunction, the orders passed or the decision rendered by the authorities concerned under the Act cannot operate as a bar to the civil Court entertaining a suit and adjudicating upon such disputed questions which are out of the purview of the authorities functioning under the Act. Hence, despite section 64-C, a party would be entitled to file a suit for adjudication of his title and for possession of lands taken over under the Act even after the grant, by the Settlement Officer, of a patta in favour of another person.

Where the 12 years period of adverse possession of immovable property of the defendant against the plaintiff under Article 144 of the Limitation Act expires on a Sunday, the plaintiff will be entitled by reason of section 4 of the Limitation Act to bring a suit for possession on the next working day and therefore a suit for possession filed on the succeeding Monday would be within time. In such a case it cannot be contended that the defendant has perfected his title by the expiry of 12 years period on Sunday and that the fact that the plaintiff may have a right to file a suit for possession relying on section 4 and section 28 of the Limitation Act on the succeeding Monday cannot affect the right which has already accrued to the defendant under Article 144 of the Limitation Act. The provisions of sections 4, 28 and Article 144 must be read together and applied. The combined operation of sections 4 and 28 is to preserve the right of the plaintiff till he files the suit on the next re-opening day. If so, where the 12 years period under Article 144 expires on a Sunday a suit for possession can be brought on the succeeding Monday. Otherwise there will be this anomaly and absurd result that by reason of sections 4 and 28 the plaintiff will have a subsisting title while by reason of the expiry of 12 years, the defendant would have acquired title by adverse possession under Article 144.

Appeal against the decree of the Court of the Subordinate Judge, Vellore, in Appeal Suit No. 159 of 1960, preferred against the decree of the Court of the District Munsif of Arni in Original Suit No. 205 of 1957.

Vedantachari and *A. Venkatesan*, for Appellant.

V. V. Raghavan, V.J. Vaidyanatha Ayyar and *P. Somasundaram* for Respondent.

The Court delivered the following

JUDGMENT.—The third defendant, who had obtained a release of the rights of defendans 1, 2 and 4, is the appellant in the Second Appeal, which relates to three items of properties, originally situated in Arni Jagir which had been taken over under the provisions of the Estates Abolition Act. One Sevugan Chettiar purchased these properties from defendants 1 to 4 under a sale-deed, Exhibit A-1 of the year 1928. In respect of these properties, there was some litigation, and, in pursuance of a decree for possession, Sevugan Chettiar took possession on 14th April, 1945, as evidenced by Exhibit A-6, Delivery Receipt. This Sevugan Chettiar sold the suit properties to the plaintiff under Exhibits A-7 on 24th January, 1957, who has filed the suit on 15th April, 1957, for declaration of title and for possession of the properties. The last date for filing of the suit would be 14th April, 1957, but that happened to be a Sunday, and it was, therefore, filed on the next day, *i.e.*, on 15th April, 1957.

It is unnecessary to refer in detail to all the facts of the case, as only two points were urged in the Second Appeal :

*S.A. No. 1909 of 1961. 4th September, 1964.

(1) the effect of the combined operation of section 4 and section 28 of the Limitation Act and (2) the scope of section 64-C of the Estates Abolition Act.

I shall first deal with the second point.

After the Jagir was taken over, defendants 1 to 4 applied for patta, and patta was granted to the third defendant by the Settlement Officer. Mr. Vedantachari, learned Counsel for the appellant contended that, by reason of section 64-C of Madras Act XXVI of 1948, which provision was added by section 25 of Madras Act XLIV of 1956, the order that was passed by the Settlement Officer issuing patta in favour of the third defendant had become final and was not liable to be questioned in any Court of Law. The relevant rule made by the Government is by notification dated 17th October, 1955, conferring jurisdiction upon the Assistant Settlement Officer and the revisional authority, for issuing of patta under section 11. Learned Counsel contends that the decisions of this Court, which has taken the view that, either before or after the repeal of section 56 in Act XXVI of 1948, the issue of patta, would not take away the jurisdiction of a civil Court to adjudicate upon competing titles, have not considered the scope of section 64-C. There is no substance in this contention. The principles laid down in the decisions of this Court in *Soosai Udayar* v. *Andiyappan*[1], and *Krishnaswami Thevar* v. *Perumal Konar*[2], would clearly govern despite section 64-C. It is unnecessary to discuss those cases in detail, as the principle enunciated in those decisions is clear, *i.e.*, only when the Revenue Authorities can grant a particular relief that their decisions would become final to that limited extent. But if the Revenue Authorities cannot grant a particular relief, namely, relief of possession and declaration of title or relief of injunction, the orders passed or the decisions rendered by the authorities concerned under section 64-C of Madras Act XXVI of 1948 cannot operate as a bar to the civil Court entertaining the suit and adjudicating upon such disputed questions which are out of the purview of the authorities functioning under the Act. If before the repeal of section 56, the position was that a party was entitled to file a suit for adjudication of his title, for possession and for injunction despite any order passed by the authorities under the Act, I do not see why section 64-C should have any higher operation than section 56, which also contained a similar provision. It is sufficient to refer to the following observations of the learned Judge (Ramachandra Iyer, J., as he then was) at page 200 in *Soosai Udayar* v. *Andiyappan*[1]:

" In the instant case the relief claimed is one of possession. Neither the Settlement Officer nor the Tribunal has any jurisdiction to grant such a relief. It may be that for the purpose of granting relief the question whether which of the parties had kudivaram rights may have to be incidentally decided but such incidental decision is only to give relief as to possession and cannot bind the Settlement Officer or the Tribunal when they have to decide that question under the Act. Section 3 (*d*) of the Act itself recognises that if a person is *prima facie* entitled to patta his possession should not be disturbed by the Government. *A fortiori* his possession should be protected by the Courts as against others. Possessory title is well-known under the law. In *Narayana Rao* v. *Dharmachar*[3], it was held that possession is good title against all but the true owner. In the case of a notified estate no question of title can arise as title would be with the Government till the grant of patta. The plaintiff if he proves possessory title should obtain possession against a trespasser without enabling the latter to acquire title by adverse possession. Similarly in a case where the plaintiff sues for injunction, relief can be given on the basis of possessory title and it would not be necessary to investigate the question of title so long as the defendant is not the owner. It may be that in such a case the question as regards the right to occupancy before the estate was taken over by the Government has to be investigated but such investigation as stated already is only incidental to the grant of relief. Bearing in mind the principle laid down by Ramaswami, J., in *Pachai Ammal* v. *Angamuthu Gramani*[4], that it is the substance of the plaint that has got to be looked into in deciding the question of jurisdiction I find that in the present case the substantial dispute is as regards possession, a relief which cannot be granted by the Tribunal under the Madras Act XXVI of 1948 and which could be granted only by the civil Court. Such being the case I am of opinion that the civil Court should entertain the suits. To hold otherwise would lead to certain practical difficulties. Let us take a case where the plaintiff is a lawful ryot but the defendant trespassed into the property. If the plaintiff's suit for possession is not entertained by the civil Court and if he is asked to go and agitate his right to patta before the Settlement Officer and the Tribunal, it may be that by the time he gets his right to patta declared by those Tribunals, the claim for possession would have become barred by adverse possession by the defendant. I am therefore of opinion that the suit in the form in which it was laid in the present case is cognisable by the civil Court."

1. (1959) 1 M.L.J. 195.
2. (1961) 1 M.L.J. 168.
3. (1902) 13 M.L.J. 146 : I.L.R. 26 Mad. 514.
4. (1958) 2 M.L.J. 439.

I, therefore, overrule this objection.

Learned Counsel next contended that, by the expiry of 12 years' period from 14th April, 1945, *i.e.*, by 14th April, 1957, his client had acquired title by adverse possession and prescription by enjoyment for 12 years and the fact that the plaintiff could file the suit on the Monday following by reason of section 4 of the Limitation Act will not affect the title which the defendant had acquired by adverse possession. He contends that the principles applicable to the application of sections 12, 14 and 15, Limitation Act, are not applicable to a case governed by section 28 of the Limitation Act. For this, he relies upon the difference in the language employed in sections 12 to 15 and that in section 28. Learned Counsel drew my attention to the decision of the Privy Council in *Maqbul Ahmad* v. *Onkar Pratap*[1], in which the Privy Council had to consider the scope of sections 14 and 4 of the Limitation Act. In that case, the mortgagee-decree-holder prosecuted certain proceedings for obtaining a final decree which became infructuous under circumstances entitling him to the benefit of section 14 of the Limitation Act for excluding the time spent in prosecuting the said prior infructuous proceedings. At the same time, while the decree-holder was prosecuting the proceedings, summer vacation intervened, and, on behalf of the decree-holder it was contended that in addition to the exclusion of the time under section 14, he would also have the benefit of section 4. The Privy Council rejected that argument, taking the view that the language of section 4 does not enlarge the period of limitation but that it merely enables the plaintiff to file the suit when the proper Court re-opened. Learned Counsel for the appellant relied upon the following observations of the Privy Council, as supporting his present contention :

"If the appellants were entitled to succeed in regard to the first period, that is, from 23rd December, 1920 to 8th November, 1921, having regard to the length of that period, that would be sufficient for them. Their Lordships however are of opinion that the Courts in India were clearly right in the way they dealt with the point. It is impossible to say, apart from any other objection, that the aplication to obtain execution under the preliminary decree was an application for the same relief as the application to the Court for a final mortgage decree for sale in the suit. That being so, it is not permissible, on the basis of section 14 in computing the period of limitation prescribed to exclude that particular period. The second period is the period of the long vacation. In regard to that matter, the appellants seem to their Lordships to be in a position which is in the nature of a dilemma. It is to be noted that there is a marked distinction in form between section 4 and section 14. The language employed in section 4 indicates that it has nothing to do with computing the prescribed period. What the section provides is that where the period prescribed expires on a day when the Court is closed, notwithstanding that fact, the application may be made on the day that the Court re-opens; so that there is nothing in the section which alters the length of the prescribed period ; whereas in section 14 and other sections of a similar nature in the Act, the direction begins with the words : 'In computing the period of limitation prescribed for any application, certain periods shall be excluded. It therefore seems to their Lordships that, where there is ground for excluding certain periods under section 14, in order to ascertain what is the date of the expiration of the prescribed period, the days excluded from operating by way of limitation have to be added to what is primarily the prescribed period, that is to say, if the prescribed period is three years, and twenty days ought to be excluded in order to determine when the prescribed period expires, twenty days have to be added to the three years, and the date of the expiration of the prescribed period is thus ascertained."

Apart from this decision of the Privy Council and other cases which had dealt with the relative operation of section 4 and sections 12 to 15, Counsel on both sides have not drawn my attention to any case which has dealt with this question of the combined operation of sections 4 and 28 dealing with suits for possession of immovable property. The position is so obvious that none had raised the present objection. On a consideration of all the aspects of the matter, I am of the opinion that the principle of the decision of the Privy Council referred to above has no application to the instant case. Section 28 provides that at the termination of the period limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished. Article 142 provides that the plaintiff must file the suit within 12 years from the date of dispossession, while Article 144 provides that the suit should be filed by the plaintiff within 12 years from the date when

1. 68 M.L.J. 665 : L. R. 62 I.A. 80 : I.L.R. 57 All. 242 : A.I.R. 1935 P.C. 85.

the possession of the defendant became adverse to the plaintiff. Mr. Vedantachari, learned Counsel, contends that under Article 144 the defendant's possession became adverse on 14th April, 1945, and he had perfected his title on 14th April, 1957, and that the fact that the plaintiff may have a right to file the suit relying upon section 4, on the succeeding Monday cannot affect the right which had accrued to the defendant under Article 144. Learned Counsel for the respondent however contends that the combined operation of section 4 and section 28 is to preserve the right of the plaintiff till the plaintiff files the suit on the reopening day. According to learned Counsel the time prescribed for filing the suit expired not on Sunday (14th April, 1957) but on Monday (15th April, 1957) by reason of section 4. He, therefore urges that, if his title had not been extinguished, but was subsisting he would undoubtedly be entitled to file the suit for possession. Under Article 142, he can file the suit within 12 years from the date of dispossession and that suit can be filed on 15th April, 1957, by reason of section 4. I think this is the correct position, as otherwise there will be this anomaly and absurd result that by reason of section 4 and section 28, the plaintiff will have a subsisting title and an undoubted right to file the suit for possession, while by reason of the expiry of 12 years, the defendant would have acquired title by adverse possession. In my opinion, all the provisions, section 4, section 28, Article 142 and Article 144 must be read together and applied. As the suit was filed on the last day as provided under the Schedule taken along with section 4, the suit would be in time.

The appeal is dismissed, but, in the circumstances, there will be no order as to costs. Leave granted.

V.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

N.N. Rm. Narayanan Chettiar .. *Petitioner**

v.

Arunachalam Pillai .. *Respondent.*

Contract Act (*IX of* 1872), *section* 213—*Agent's duty to render accounts to his principal—Suit against agent for recovery of, a specific sum covered by certain items in the accounts—Maintainability.*

An agent is liable to render accounts to his principal but the principal cannot pick up some items in the accounts and file a suit for recovery of the amounts covered by those items as if they are amounts due and payable by the agent to the principal. The suit should be in the form of a suit for accounts.

It is settled law that an agent will not discharge himself from the duty of accounting by merely delivering to his employer a set of written accounts without attending to explain them and without producing vouchers by which the items of disbursements are supported. It is equally settled law that a decree passed in favour of the principal without calling upon his agent to explain his accounts and without finding whether any item requires explanation or has been wrongly or falsely entered is not valid.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Tuticorin, dated 21st November, 1961 and passed in Small cause suit No. 335 of 1961.

K. Parasaran, for Petitioner.

C. S. Rajappa, for Respondent.

The Court delivered the following

JUDGMENT.—This Civil Revision Petition is against the order passed by the learned District Munsif of Tuticorin dismissing the suit filed by the petitioner herein for recovery of a sum of Rs. 358.23. The allegations in the plaint are as follows. The plaintiff and his brother were jointly conducting business and they owned salt pan at Tuticorin. The respondent herein was an accountant in the said concern. Subsequently there was a partition of the concern between the brothers, and the respondent became the accountant of the petitioner herein in respect of his business

*C.R.P. No. 867 of 1962. 9th November, 1964.

at Tuticorin. The respondent was liable to maintain proper accounts and render them when his services were terminated. During his services the petitioner received a complaint that the respondent did not maintain accounts properly. The petitioner sent his father-in-law to check the accounts and it was found that he was keeping with him large amounts without depositing them in the bank. Therefore, the petitioner asked the respondent to go over to his place with all the account books and records and render proper accounts. The respondent complied with the petitioner's demand, and it was found that the accounts were not written properly and finally the respondent's services were terminated. The petitioner, according to him, when he went through the accounts, found certain discrepancies with regard to some items, which are now the subject-matter of the suit, which he filed.

The question for consideration in the Court below was whether the suit was maintainable. The respondent contends that the suit should be in the form of a suit for accounts and the petitioner cannot pick up some items in the accounts and file a suit for recovery of the amounts covered by those items as if they are amounts due and payable by the respondent to the petitioner. The learned District Munsif dismissed the suit on the ground that the suit is not maintainable.

Learned Counsel for the petitioner cited a number of decisions but on going through those decisions I am convinced that the conclusion arrived at by the learned District Munsif is correct. In *Kshetra Nath* v. *Kali Dasi*[1], the plaintiff claimed a specific sum of money due on account of salary and house rent and contended that if the correctness of the amount was questioned the amount due might be determined on examination of the accounts. The defendant contended that the suit was cognizable by a Court of Small Causes and not by a Civil Court, and the Munsif ordered the plaint to be returned to the plaintiff for presentation to the proper Court. In the above decision it was observed as follows at page 1038 :

"A suit for the recovery of a specific sum of money does not assume the character of a suit for accounts, merely because in the determination of the question in controversy accounts may have to be examined. This has been pointed out in a long series of decisions........... There cannot in essence be a suit for accounts by the plaintiff against the defendant, unless the defendant is under a liability to render accounts to the plaintiff".

In *B. C. Chakrabarty* v. *K. C. Rai*[2], it is observed that it is not open to any principal who has got all the accounts of his agent in his possession to employ the machinery of the Courts for examining his accounts on the off-chance of making his agent liable for any sum which on such examination may be found due from him. Equally it is settled law that an agent will not discharge himself from the duty of accounting, by mererly delivering to his employer a set of written accounts without attending to explain them, and without producing vouchers by which the items of disbursements are supported. It is also equally a settled law that a decree passed in favour of the plaintiff without calling upon his agent to explain his accounts and without finding whether any item requires explanation or has been wrongly or falsely entered is not valid.

In *Nalini Kumar* v. *Gadadhar*[3], the principle laid down in *B. C. Chakrabarty* v. *K. C. Rai*[2], has been followed. In *Shiva Prasad* v. *Hanuman Bux*[4], the plaintiffs filed a suit against their agent, who was in charge of a shop, for accounts alleging that he had misappropriated a sum of Rs. 5,100. The defence to the suit was that all the account books being with the plaintiff, the defendant could not be sued without giving details of the claim. It was observed by a Bench at page 393 as follows :

"Indeed it is true that an agent merely by handing over to his principal a set of account book is not absolved from the liability to explain them but where the principal who is in possession of all the account books sues his agent for accounts he is expected to disclose such particulars as will establish a *prima facie* liability of the defendant to account. In the present case no such particulars are given. There is a bare allegation in the plaint that on examination of the accounts the plaintiffs found that the defendant had misappropriated at least Rs. 5,100."

In *Godhanram* v. *Jaharmull Puglia*[5], it observed at page 339 :

1. A.I.R. 1918 Cal. 1037.
2. A.I.R. 1925 Cal. 1069.
3. A.I.R. 1929 Cal. 418.
4. A.I.R. 1938 Pat. 392.
5. I.L.R. 40 Cal. 335.

"It is not disputed that the first defendant as agent was liable to render accounts to the plaintiff of all his dealings in the various transactions carried on by him as agent on behalf of the plaintiff. But what is argued is, that, in the absence of a special contract in that behalf, the plaintiff cannot be permitted to select capriciously a single transaction and claim the fruits thereof, without an adjustment of the rights and liabilities of the parties in relation to other transactions. This contention is manifestly sound."

Reviewing the entire case-law on the subject it seems to me that an agent is liable to render the accounts but his principal cannot off-chance pick up some items and then file a suit for the recovery of the amounts covered by those accounts as if those amounts are debts due and payable by the defendant to the suit.

Mr. Parasaran, learned Counsel for the petitioner cited the decision in *Subramanian* v. *T.R.M.T.S.T. Firm, Ela*[1], where it is observed that if the principal is in the main satisfied with the agent's accounts, and only takes objection to certain items therein which he is prepared to specify, then the result of bringing a suit in regard to these particular items only is to relieve the agent of a considerable burden. I am not inclined to follow this decision because no principle has been laid down. But here in this case the respondent is contending that he is entitled to get some more amounts from the petitioner himself. It is an admitted fact that the accounts have not been settled, nor was he called upon to render an account before the suit was filed. Therefore, considering the case-law on the subject and going through the evidence, I feel that the conclusion arrived at by the learned District Munsif is correct. The Civil Revision Petition is accordingly dismissed. There will be no order as to costs.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Mahboob Badsha .. *Petitioner**

v.

M. Manga Devi and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 14 (1) (*b*)—*Eviction of tenant under on the ground that building is* bona fide *required by landlord for demolition—Conditions to be fulfilled—Old age or dilapidated condition of building—If a* sine qua non *for such eviction.*

Under section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) the crucial factor is the *bona fides* of the landlord in requiring the building for immediate demolition and so long as the application is not prompted by any ulterior motive with a view to merely evict the tenant simply relying upon immediate demolition as the ground for eviction, the landlord is entitled to possession of the property. Old age or dilapidated condition of the building is not a necessary condition to sustain an application under section 14 (1) (*b*) but it is only one of the circumstances to be taken into account in coming to the conclusion about the *bona fide* requirement of the landlord for the purpose of demolition. If the building is very old and dilapidated a case for demolition would be easily made out, but that is not the same thing as saying that in other cases there cannot be any eviction even though the landlord genuinely intends to immediately demolish and reconstruct the building and had made all arrangements to carry out his scheme and is backed up by enough financial resources.

There is nothing in the language of section 14 (1) (*b*) to warrant the interpretation that the words "*bona fide* required by the landlord" is referable only to the condition of the building ruling out every other consideration. It must not be forgotten that the Madras Buildings (Lease and Rent Control) Act is in essence expropriatory in character involving serious curtailment of the rights of owners of properties and therefore Courts should not give any undue or wide interpretation to the provision beyond what the express language of the provision warrants, in consonance with the avowed object of the legislation, namely, unreasonable eviction of tenants. There is nothing in the object of the enactment or in the language of section 14 (1) (*b*) which compels or necessarily warrants the view that once a building is let out, the landlord can never obtain possession of the property either for better investment or for improvement in the sense that the tenant acquires a permanent right, as it were, subject only to the dilapidated condition of the building. The condition of the building is obviously an objective test to be established by evidence and capable of verification by personal local inspection. If the crux of the question centres round the physical state or condition of the building, there will be very little scope for the notion of a *bona fide* requirement. There is no warrant for reading the words "*bona fide* required by the landlord" in section 14 (1) (*b*) as equivalent to "building *bona fide* requiring demoli-

1. A.I.R. 1935 Rang. 209.

*C.R.P. Nos. 1255, 1337, 1338 and 1342 of 1964. 29th December, 1964.

tion" Either the building requires demolition or not. But it is not possible to have a conception of a building *bona fide* requiring demolition. A decrepit building no doubt may call for immediate demolition and without anything more the landlord could be said to have satisfied the requirement or condition of his *bona fide* requiring the building for immediate demolition. But the terms of the section are clearly wide enough to cover cases where the landlord *bona fide* requires a building for the expansion of his own business or for legitimate purposes. A concrete and immediate proposal or scheme to demolish an existing building and reconstruct it into a bigger, more productive and higher income yielding one cannot by any means be said to be *mala fide*. The proper view to take of section 14 (1)(*b*) would be that whenever the condition of the building is not such as to require immediate demolition the case of the landlord should be scrutinised to find out whether he *bona fide* intends to immediately demolish the building or whether the provision is invoked merely with a view to evict the tenant. In that context the plans or schemes of the landlord, his resources, his getting sanction from the Municipal authorities for the reconstruction etc. would have a bearing as tending to establish the *bona fide* requirement of the landlord. Section 14(1)(*b*) is not rendered inapplicable merely because the building is not old or dilapidated but is in a good condition. In other words, if the intention of the landlord for demolition and reconstruction is proved to be genuine and not spurious or spacious, he will be entitled to obtain an order for eviction under section 14 (1) (*b*) whether or not the condition of the building is such as to require immediate demolition, the age and dilapidated condition of the building not being a *sine qua non* for such eviction.

Petitions under section 25 of Act XVIII of 1960 praying the High Court to revise, the orders of the Chief Judge, Court of the Small Causes, Madras, dated 25th April, 1964, and 6th February, 1964, and made in H.R.A. Nos. 701, 722, 713 and 714 of 1963 respectively (H.R.C. Nos. 5129, 5133, 5132 and 5134 of 1962 on the file of the House Rent Controller, Madras).

K. K. Sreedharan, for Petitioner.

N. Sivamani for *V. K. Kumaraswami*, for Petitioner in C.R.P. Nos. 1337, 1338 and 1342 of 1964 and for Respondent in C.R.P. No. 1255 of 1964.

Inamdar Abdul Salam, for Respondent in C.R.P. No. 1337 of 1964.

J. R. Dass, for Respondent in C.R.P. No. 1342 of 1964.

The Court made the following

ORDER.—This batch of petitions arises out of four petitions filed by the landlady under section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, Madras Act XVIII of 1960, (hereinafter referred to as the Act) alleging that the building is *bona fide* required by her for the immediate purpose of demolishing it and such demolition was to be made for the purpose of erecting a new buliding on the site of the building sought to be demolished. All the four petitions were heard together and disposed of and allowed by the Rent Controller by a common order. There were four separate appeals which were disposed of by four separate orders of the Appellate Authority. In three cases, out of which C.R.P. Nos. 1337, 1338 and 1342 of 1964 arise, the petitions of the landlady were dismissed and the order of the Rent Controller reversed while in one appeal the order of the Rent Controller was confirmed. C.R.P. No. 1255 of 1964 has been preferred by the tenant while the other three Revision Petitions have been preferred by the landlady.

The buildng in question is a non-residential one situated in Triplicane High Road, a very busy business centre. The four tenants were each occupying a shop in front and carrying on business there ; all the four shops constituted one block essentially forming part of one single building, though let out as separate units. In the petitions the landlady alleged that these shops are more than a century old, and old fashioned being tiled ones, and that she wanted the possession of the buildings with a view to immediately demolish these old shops and put up a pucca new terraced building on one block for which purpose she had applied to the Corporation of Madras and had also obtained sanction of the plan in B.A. No. 5829 of 1962 on 12th November, 1962. Her further case was that as the premises in question is in a commercial and business locality of the City, it would be more advantageous to have a new construction with a double-storey for constructing which she has ample resources.

The four tenants filed separate objection statements in none of which was any suggestion made that the petition for eviction was filed with any ulterior motive or as a lever to obtain enhanced rent. The main objection by the four tenants was of the same pattern, *i.e.*, that the building was not so bad and in such a dilapidated condition as to require immediate demolition. The statement of the landlady about her resources and means to put up a new building was not questioned by any of the tenants.

Before the Rent Controller, the agent of the landlady, was examined on her side, while on the side of the tenants, two tenants, one Mehboob Basha, tenant in H.R.C. No. 5927 of 1962 and Jaffer Baig tenant in H.R.C. No. 5133 of 1962 were examined as R.Ws. 1 and 2.

The Rent Controller came to the conclusion that the evidence of P.W. 1, the agent of the landlady, was substantially true, that there was no rebutting evidence, that the buildings were 60 or 70 years old that the landlady *bona fide* required the building for the purpose of demolishing and for putting up a new construction. This view was reversed by the Appellate Authority by a process of reasoning which I consider singularly perverse. A reading of the appellate orders in three cases shows that the Appellate Authority has misread the evidence and overlooked the fact that in two cases there has been no rebutting evidence and in one case the tenant who examined himself admitted that the condition of the building was fifty or sixty years old and required demolition and reconstruction. Again in the other case in which the tenant Jaffer Baig has been examined as R.W. 2 he has not said a word about the condition of the building, with the result that the evidence on the side of the landlady with regard to the condition or age of the building remained unrebutted. But yet the Appellate Authority has rejected the same on the ground that his testimony is interested. It has overlooked the fact that there has not been any effective cross-examination of P.W. 1 by any of the tenants with regard to the building and its condition.

The Appellate Authority has evolved a new theory as though there is or was any distinction between the condition or age of the buildings between one and the other. It has lost sight of the fact that the four shops constituted one block, that a single common petition was filed, that the allegations were all common, that there was no separate pleading with regard to each building, and that the tenants themselves never made any difference between one building or another, and that the defence in all was a common one *i.e.*, that the building was not in such immediate danger of requiring demolition and reconstruction. Even in the evidence stage no distinction was made between one building and another and even before the Rent Controller the same attitude was adopted by all the tenants. The Appellate Authority dissects the evidence of P.W. 1 and R.W. 1 and R.W. 2 as referable to certain shops as though it is capable of such analysis and comes to the conclusion that the evidence which was adduced by R.W. 1 was not in relation to the premises in question. Even the brief evidence, has not been carefully analysed by the Appellate Authority, and its order is vitiated by mistakes and errors as to what the witnesses have deposed.

The Appellate Authority took an extreme view that a landlord can ask for possession under section 14 (1) (*b*) only if the buildings are old and dilapidated requiring immediate demolition, that the old age and dilapidated condition of the building constituted the condition for eviction and that alone should be taken into account, that no other consideration would be germane such as the genuine *bona fide* desire of the landlord or his need to put up a new building with a view to make the property yield a better income and return. He also took the curious view, which I have no hesitation in characterising as perverse, in holding that unless a notice was received from the Corporation demanding immediate demolition the building cannot be said to be old and that when a shop had been leased out about seven months ago, that itself was sufficient to conclusively establish that the building was not old but new and therefore could not be required for demolition. I have stated enough to

indicate that the order of the Appellate Authority cannot be obviously supported, justifying this Court's interference under section 25 of the Act.

On behalf of the tenants it was urged that under section 14 (1) (*b*) a tenant can be evicted only if the building is old and dilapidated requiring immediate demolition, and that the words " the building is *bona fide* required by the landlord for the immediate purpose of demolishing " relate solely and exclusively to the condition of the building and has nothing to do with the intention or object of the landlady or landlord though prompted by the best of motives, namely, to make a better investment with a view to get a good return by putting up a new building, even for purposes of letting out. On behalf of the landlady, it was argued that under section 14 (1) (*b*) the crucial factor is the *bona fides* of the landlord in requiring the building for immediate demolition, and that so long as the application is not prompted by any ulterior motive with a view to merely evict the tenant simply relying upon immediate demolition as the ground for eviction, the landlord is entitled to possession of the property. He urged that the old age or the dilapidated condition of the building is not a necessary condition to sustain an application under section 14 (1) (*b*) but that it is only one of the circumstances to be taken into account in coming to the conclusion about the *bona fide* requirement of the landlady for the purpose of demolition. In substance his argument was that if the building was very old and dilapidated a case for demolition would be easily made out, but that that is not the same thing as saying that in other cases there cannot be any eviction even though the landlady genuinely intended to immediately demolish and reconstruct and had made all the arrangements to carry out her scheme backed up by enough financial resources. On an interpretation of the relevant provisions of the Act and on a consideration of the case-law, I am of opinion that the contention raised on behalf of the landlady should be accepted as well founded.

The relevant provision in section 14 may now be extracted :

Section 14. " Recovery of possession by landlord for repairs or for reconstruction: (1) Notwithstanding anything contained in this Act, but subject to the provisions of sections 12 and 13, on an application made by a landlord, the Controller shall, if he is satisfied—(*b*) that the building is *bona fide* required by the landlord for the immediate purpose of demolishing it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date.

(2) No order directing the tenant to deliver possession of the building under this section shall be passed—.... (*b*) on the ground specified in clause (*b*) of sub-section (1) unless the landlord gives an undertaking that the work of demolishing any material portion of the building shall be substantially commenced by him not later than one month and shall be completed before the expiry of three months from the date he recovers possession of the entire building or before the expiry of such further period as the Controller, may for reasons to be recorded in writing, allow............"

Section 16 provides that if the landlord had not commenced the work of demolition within the period of one month as per his undertaking under clause (*b*) of section 14 (2), the tenant will be entitled to restoration of possession of the property originally occupied by him after giving the requisite notice to the landlord. It has to be noticed at the outset that these provisions, sections 14 to 16 are new provisions enacted in the Madras Act of 1960 for the first time. The Rent Control legislation of some of the other States contains like provision though employing different language and imposing different condition.

Taking the language of the section, I see nothing in it to warrant the interpretation that the words "*bona fide* required by the landord" be referable only to the condition of the building ruling out every other consideration. It must not be forgotten that this legislation is in essence expropriatory in character involving serious curtailment of the rights of owners of properties and therefore Courts should not give any undue or wide interpretation to the provision beyond what the express language of the provision warrants, in consonance with the avowed object of the legislation, namely, unreasonable eviction of tenants. I see nothing in the object of the enactment or in the language of the provision which compels or necessarily warrants the view that once a building is let out, the landlord can never obtain possession of the property either for better investment or for improvement in the sense that the tenant

acquires a permanent right, as it were, subject only to the dilapidated condition of the building. The very fact that section 14 (1) (*b*) provides that demolition is to be made for the purpose of erecting a new building in the place of the one sought to be demolished shows that more and better accommodation is intended to be secured. In my opinion, the provision in section 14 (2) (*b*) requiring demolition to be commenced within one month and completed within three months emphasises that the old age or the dilapidated condition of the building is not the decisive factor under section 14 (1) (*b*). The condition of the building is obviously an objective test to be established by evidence and capable of verification by personal local inspection. If the crux of the question centres round the physical state or condition of the building, there will be very little scope for the notion of a *bona fide* requirement. There is no warrant for reading "*bona fide* required by the landlord" as equivalent to "building *bona fide* requiring demolition". Either the building requires demolition or not. But it is not possible to have a conception of a building *bona fide* requiring demolition. A decrepit building no doubt may call for immediate demolition and without anything more, without any further provision the landlord could be said to have satisfied the requirement or condition of his *bona fide* requiring the building for immediate demolition. But the terms of the section are clearly wide enough to cover cases where the landlord *bona fide* requires a building for the expansion of his own business or for legitimate purposes. A concrete and immediate proposal or scheme to demolish an existing building and reconstruct it into a bigger more productive and higher income yielding one cannot by any means be said to be *mala fide*. In my opinion the proper view to take of this provision is that whenever the condition of the building is not such as to require immediate demolition the case of the landlord should be scrutinised to find out whether he *bona fide* intends to immediately demolish the building or whether the provision is invoked merely with a view to evict the tenant. In that context the plans or schemes of the landlord, his resources etc., would have a bearing as tending to establish the *bona fide* requirement of the landlord. In my opinion, section 14 (1) (*b*) is not rendered inapplicable merely because the building is not old or dilapidated but is in a good condition.

When this provision was introduced for the first time in 1960 it can be legitimately presumed that the Madras Legislature adopted the scheme of the corresponding analogous provision in the other States and how the Courts in those States have dealt with the question. In *Bhulan Singh* v. *Ganendra Kumar*[1], a Bench of the Calcutta High Court had to consider the scope of section 11 of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1948. Section 11 of the Act provided that a tenant cannot be evicted so long as he pays to the full extent the rent allowable under the Act, and performs the conditions of the tenancy and the following proviso exempted the application of this provision; "nothing in this sub-section shall apply where the premises are *bona fide* required by the landlord either for purposes of building or rebuilding, or for his own occupation or for the occupation of any person for whose benefit the premises are held". Suits were filed against a batch of tenants on the ground that the premises in question were between 100 to 150 years old and were in a dilapidated condition. The Bench took the view that the words "*bona fide* required by the landlord", cannot be read as "premises *bona fide* requiring rebuilding". Harris, C.J., delivering the judgment of the Bench put the matter thus:

"It was suggested that this provision giving the landlord a right to possession, if he established that he required the premises *bona fide* for rebuilding could have no application whatsoever unless the state of the premises was such that they required to be rebuilt. It is to be observed that proviso (*f*) to section 11 (1) of the Act does not mention premises requiring rebuilding. What it states is that sub-section (1) shall have no application if the landlord requires the premises *bona fide* for rebuilding. The state of the premises therefore is not an essential factor in the case. However, it cannot be overlooked that in this case the learned Judge has accepted the evidence of a witness which showed that these premises were very old, dilapidated, dangerous and likely to fall if extensive repairs were not done to them quickly.

It appears to me that the premises are *bona fide* required by the landlord for the purpose of "rebuilding" if the landlord honestly requires them for that purpose. The equivalent of the phrase

1. A.I.R. 1950 Cal. 74.

'*bona fide*' is 'honestly'. It refers to the state of the landlord's mind. The landlord therefore will be entitled to possession as against the tenant if he established that he honestly requires the premises for rebuilding."

The Bench did not accept the argument that the landlord could not *bona fide* require the premises for rebuilding unless rebuilding was absolutely necessary, and that the disturbance of the tenants was also absolutely necessary. The *ratio decidendi* of this decision is that if the landlord establishes *bona fide* the requirement for rebuilding and the Court is satisfied on the facts placed before it that the landlord honestly desires to rebuild and has the means to rebuild and will certainly rebuild if possession is given to him then the landlord would be entitled to evict the tenant. In the case of an old dilapidated building the Court does not generally require proof of other circumstances but if the condition of the building is good the Court would require proof by other circumstancs such as means, sanctioned plans etc.

In *S.E.E. Works.* v. *Radha Devi*[1], a Bench of the Calcutta High Court had to deal with section 12 (1) (*h*) of the West Bengal Premises Rent Control (Temporary Powers) Act of 1950. That provision provided that if the premises were *required reasonably* by the landlord for the purpose of rebuilding, the landlord can obtain an order for eviction. The significance of the use of the adverb 'reasonably' came up for decision. The matter was explained thus at page 229 :

"The test of reasonableness must be whether the purpose for which the rebuilding is proposed is reasonable. Three things are necessary. First, the occupation of the premises by the landlord must be required ; secondly, that requirement is reasonable. If the purpose of rebuilding is merely to make the house more beautiful, that would not be considered a reasonable requirement. If, on the other hand, the purpose of rebuilding, as in this case, is to ensure the safety of the tenants and the preservation of property, the requirement must be ordinarily considered to be reasonable."

In *Mukerjee* v. *Abboypada Banerjee*[2], again another case under the same provision of the West Bengal Act of 1950, the Calcutta High Court held that the fact that the new building would not accommodate more than one family, and that the proposed new alterations would enure more to the benefit of the landlord than of the public, and that the advantage of the public would be very small are not circumstances as to make the requirement of the landlord not reasonable. In the West Bengal Premises Rent Control (Temporary Powers) Act of 1950 there was a new provision, which was not in the 1948 Act, to the effect that the Court in determining the reasonableness of the requirement of the landlord "should have regard to a comparative public benefit or disadvantage by extending or diminishing accommodation.". There is no such provision in the Madras Act and the Madras Act is more on the pattern of the earlier Bengal Act of 1948, which came up for discussion in *Bhulan Singh* v. *Ganendra Kumar*[3].

In the *Punjab Motor Co.* v. *Shaik Juman*[4], the Bench of the Rangoon High Court had to deal with section 10 of Rangoon Rent Act of 1920. In that case the landlord wanted the premises for demolishing the old one and erecting a new four-storeyed building. It was held that if the landlord had the means to carry out the purpose and had the *bona fide* intention to do so he was entitled to a decree in ejectment in the view that the Rent Act was not intended to interfere with the legal user of private property.

In *Mohammed Azizuddin* v. *Aziz Hassan*[5], the Bench of the Andhra Pradesh High Court had to consider the scope of section 15 (3) (*a*) (iv) of the Hyderabad Houses (Rent, Eviction and Lease) Control Act of 1954, the material portion of which runs as follows :

"A landlord may, subject to the provisions of clause (*d*), apply to the Controller for an order directing the tenant to put the landlord in possession of the house.

. . . .

(iv) if the landlord desires to carry out essential repairs or alternations to the house which cannot be made without the tenant vacating the house *bona fide* requires the house for the purpose of building or rebuilding or for making substantial additions which cannot be made without the tenant vacating the house :"

1. A.I.R. 1957 Cal. 227.
2. A.I.R. 1958 Cal. 229.
3. A.I.R. 1950 Cal. 74.
4. A.I.R. 1923 Rang. 13.
5. (1960) 2 An.W.R. 203.

In that case the landlords filed an application on the ground that they had no house of their own and that they wanted to demolish the building with a view to rebuild a three-storeyed building for their residence in the first two floors and for letting out the third floor. The question was whether the landlords had satisfied that they *bona fide* required the house for the purpose of building or rebuilding. The matter was put thus at page 205 :

> " In so far as clause (iv) is concerned, the landlord would be entitled to an order for eviction if he *bona fide* requires the house for building or rebuilding or making substantial repairs, etc. Here again the question of *bona fides* would be a question of fact, that is, the Rent Controller would be entitled to take into consideration the fact that the landlord has the means and that he intends in fact to construct a big or a small building, and whether it is reasonable or necessary to construct it or not is not a matter which could be taken into consideration because that would depend upon the means and the intention of the landlord to make the best use of his property, a matter in which his view will not be substitued by the view of the Rent Controller. If the landlord has the means to build and intends to build a three-storeyed building as in this case, that does not go counter to the policy of the Rent Control Act. In fact, it may effectuate the policy because the policy of the Rent Control Act is to protect the tenants, having regard to the scarcity of accommodation. If a landlord can afford to build premises with greater accommodation, certainly that would in some way relieve the scarcity. "

It may be mentioned that the Bench of the Andhra Pradesh followed the principle of the decision of the Calcutta High Court in *Bhulan Singh* v. *Ganendra Kumar*[1], and the decision of the Rangoon High Court referred to earlier.

From the above decisions it will be seen that the test of the landlord *bona fide* requiring the building does not necessarily depend upon the bad conditions or the old age or dilapidated condition of the building.

In *Ramchander* v. *Kidar Nath*[2], the Court had to interpret section 13 (3) (*a*) (iii) of the Punjab Urban Rent Restriction Act which was in these terms :

> " A landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in the case of any building, if he requires it for the re-erection of that building, or for its replacement by another building, or for the erection of other buildings. "

The Court held that the landlord will be entitled to eviction and that it was not a necessary condition that the building should be in a dilapidated stage requiring demolition on the ground that it was not the state of the building which was the test of rebuilding but it was the desire of the landlord to rebuild. The decision of the Calcutta High Court first cited was followed.

In *Basu Doss* v. *Piare Lal*[3], Khosla, J., dissented from the earlier decision of the Punjab High Court referred to and held that it was not the desire of the landord to rebuild but his *bona fide* need for reconstruction that was the determining factor.

An examination of the recent decisions of this Court shows that the old age or the bad or dilapidated condition of the building is not regarded as an essential *sine qua non* for an order for eviction. In *Ahamed and Sons and others* v. *N. Sivathanu*[4], Ramachandra Iyer, C.J., expressed the opinion that the right of the landlord is not confined to cases of old buildings which require demolition for that reason. The learned Judge pointed out that it is not the duty of judicial authority to have preconceived ideas in the matter of construction of expropriatory legislation or exhibit any zeal to see that a tenant is protected as far as possible. Emphasising that the object of the Act is only to prevent arbitrary eviction of the tenants the learned Chief Justice put the matter thus :

> " There is yet another reason. In the present case the building was in a sound condition. The landlord wanted it no doubt for being pulled down so that he can put up a boarding house whereby to enable him to earn more out of it, a legitimate ambition by itself. But till he was able to make the tenants vacate it there was nothing wrong in his requiring a fair rent to be paid, and, the steps taken in that behalf cannot be considered as otherwise than *bona fide*."

In *Ramachandran* v. *Kazim Khalleli*[5], Kailasam, J., while construing section 14 (1) (*b*) observed that it was not necessary that the building should be very old

1. A.I.R. 1950 Cal. 74.
2. A.I.R. 1954 Punj. 135.
3. A.I.R. 1959 Punj. 23.
4. C.R.P. Nos. 1763 to 1766 of 1963.
5. (1964) 77 L.W. 632.

and decrepit to enable the landlord to claim that his immediate purpose was for demolition of the building. The learned Judge did not accept the argument that the condition of the building should be regarded as the decisive factor. In *Madavan Vaidyar* v. *N. M. Natarajan and another*[1], Kailasam, J., has reiterated the same view and rejected the argument that the landlord himself must make out as a condition of eviction that the building was in such a state of bad condition that it required immediate demolition.

My attention was also drawn to the judgment of Venkatadri, J., in a batch of revision cases, *Chandrasekara Chetty* v. *Sri Kakumani Audikesavalu Chetty Charities*[2]. The learned Judge has reviewed the entire case-law and following the decisions of this Court referred to earlier held that section 14 (1) (*b*) is not confined to a bad and dilapidated building. The learned Judge has summed up the position as follows :

> "In order to prove *bona fides* in such applications as the present one, where the landlord requires the building for the immediate purpose of demolition, he should satisfy the deciding authority that his requirement is a reasonable and *bona fide* one, that he has prepared the plans and the necessary estimates for the new building, that he has obtained the necessary sanction from the Corporation or the Municipal authorities for the purpose of such erection and that he has got the necessary funds with him to carry out such reconstruction."

With respect I think this is the correct legal position.

Learned Counsel for the tenants relied upon a judgment of Anantanarayanan, J., in *Mehsin Bhai* v. *Hale & Co.*[3], as laying down that under section 14 (1) (*b*) a landlord can make out a *bona fide* requirement for demolition only if the condition of the building is old and dilapidated. This decision has already been considered and referred to by Kailasam, J., and Venkatadri, J. The facts of the case are not fully set out in the judgment and after carefully perusing the same, I am unable to agree with the contention of learned Counsel for the tenants regarding the purport of this judgment. The learned Judge has observed that the criteria to be pplied by the Court are several and the Court should have to come to a decision upon the totality of the facts. There is no reference in that decision to the immediate preparedness of the landlord for demolition and for putting up immediately a new building, whether the landlord had obtained the sanction of the municipal authorities and whether the landlord had the necessary resources and such other relevant consideration. With great respect I am unable to read this judgment as containing any pronouncement or statement of the law about the scope of section 14 (1) (*b*). I see force in the contention of the learned Counsel for the landlady that this case was dismissed in the admission stage and the attention of the learned Judge had not been drawn to several decisions touching the aspect.

It is necessary, at this stage, to refer to the judgment of the Supreme Court in *Neta Ram* v. *Jiwan Lal*[4], which has been referred to by Kailasam, J., and Venkatadri, J. Learned Counsel for the tenants contended that the learned Judges of this Court have not correctly appreciated the *ratio decidendi* of the decision of the Supreme Court, and that according to that decision the determining or the decisive factor is the bad or dilapidated condition of the building ; and that if that condition is not satisfied a landlord is not entitled to obtain eviction despite his establishing the other considerations like genuine desire, means and immediate preparedness to demolish and to put up a new building. After carefully examining that decision I am unable to take the view that it supports the extreme contention put forward on behalf of the tenants. In the first place, it must be observed that the observations made therein should be understood in the essential background of the established facts of that case. In that case the Rent Control Authorities found that there was no proof that the building was in a dilapidated condition or the financial status of the landlord was such as to say that he had a genuine desire to demolish and reconstruct the building. It was also found that the shops were in good condition and that the landlord was not in good faith wanting to replace the building when he had no means to build it.

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1. C.R.P. No. 68 of 1964.
2. 78 L.W. 326.
3. (1964) 2 M.L.J. 147.
4. (1962) 2 S.C.J. 270 : A.I.R. 1963 S.C. 499.

In Revision the High Court reversed the decision of the Rent Control Authorities and ordered eviction on the short ground that the actual condition of the premises was a wholly irrelevant consideration. Section 13 of the Patiala and East Punjab States Union Urban Rent Restriction Ordinance provided that the landlord may apply for eviction " in the case of any building if he (the landlord) requires it for re-erection of the building or for its replacement by another building or for the erection of other buildings ". It also provided that the Controller shall, if he is satisfied that the claim of the landlord is *bona fide*, make an order directing the tenant to put the landlord in possession of the building. The Supreme Court took the view that the High Court had exceeded its powers of revision in interfering with a decision on a question of fact when it has not been made out that the decision of the Rent Control Authorities was erroneous or improper. On the question of the construction of the provision of the Act the Supreme Court observed that according to the provision it should be established that the claim of the landlord that he required the building for reconstruction and re-erection, must be *bona fide*; that is to say, " honest in the circumstances ". It was also pointed out that such a requirement should be considered in relation to the surrounding circumstances of the case. The matter was put thus at page 502 :

" The very purpose of the Rent Restriction Acts would be defeated if the landlords were to come forward and to get tenants turned out, on the bare plea that they want to reconstruct the houses, without first establishing that the plea is *bona fide* with regard to all the circumstances, *viz.*, the houses need reconstruction or that they had the means to reconstruct them *etc.* The two Tribunals below had gone into the matter thoroughly, and had agreed that the landlord had neither the means to reconstruct the building nor had he made any attempt to face cross-examination as a party. They were also of the opinion that the building was in a good state and did not need to be pulled down or reconstructed. "

It must at once be noticed that the Supreme Court had used the disjunctive ' or ' when referring to the condition of the building and the means of the landlord to reconstruct them. I have no doubt that quite a different language would have been used to express the idea if the Supreme Court meant to hold that the decisive factor was the bad dilapidated condition of the building and nothing else. The very fact that reference was made to the absence of resources of the means of the landlord indicate that in the view of the Supreme Court the means of the landlord and his immediate preparedness to demolish and reconstruct are equally germane and relevant considerations.

In this connection I may refer to the decision of the Supreme Court in *Moti Ram* v. *Suraj Bhan*[1], which had to consider section 13 (3) (*a*) (iii) of the unamended East Punjab Urban Rent Restriction Act III of 1949. In that case the application for eviction was filed both on the ground of wilful default in the payment of rent and also on the ground that the landlord required the shop for his personal use and with a view to reconstruct the shop for which the necessary plan has been prepared and sanction obtained from the municipal committee. Section 13 (3) (*a*) (iii) of the East Punjab Act provided that the landlord may apply to the Controller for an order directing the tenant to put the landlord in possession in the case of any building if he requires it for rebuilding or for its replacement by another building or for the erection of other buildings. The High Court held that the requirement of the landlord was *bona fide* and there was no evidence to show that the requirement of the landlord was otherwise. While affirming the decision of the High Court, Gajendragadkar, J., as he then was, delivering the Judgment of the Supreme Court observed as follows :

" All the relevant evidence available on the record on this point clearly sustains the view taken by the High Court that the case made by the landlord under section 13 (3) (*a*) (iii) was *bona fide*. Soon after he purchased the house he decided to reconstruct the building, moved *the municipality with his plan and obtained its sanction. It is difficult to understand how on these facts it would be permissible to hold that the landlord is acting* mala fide. "

From these observations it will be clear that the arrangements made by the landlord, his resources and getting sanction of the plan from the Municipality are all undoubtedly relevant and germane considerations bearing upon the question of the *bona fide* requirement of the landlord.

1. (1960) S.C.J. 699 : A.I.R. 1960 S.C. 655.

In my opinion, in arriving at the proper interpretation of section 14 (1) (*b*) it must be borne in mind that this provision was introduced for the first time in 1960 with a plethora of State legislations of various States, dealing with the topic of demolition and reconstruction. The Legislature does not use the expression " reasonably requires " as in some other States which connote some element of objectivity. The Madras provision has reproduced the Bengal Act of 1948 and not even that of 1950. In the 1950 Bengal Act on the topic of demolition and reconstruction the Bengal Act has added a rider as it were that the relative public advantage on the question of increase or decrease in accommodation would be a relevant consideration. In the Madras Act there is no such provision. Further the question of the relative hardship to the tenant outweighing the advantage of the landlord as bearing upon the question of eviction has been provided in the Madras Act in the proviso to section 10 (3) (*c*), dealing with the requirement of additional accommodation by the landlord to prevent arbitrary or unreasonable eviction which would frustrate and defeat the object of the Act. Section 14 has imposed the conditions that the purpose must be not only immediate demolition simpliciter but also the purpose of immediate reconstruction. In other words both the conditions immediate demolition and immediate reconstruction must be satisfied concurrently. A time limit has also been specified for the commencement of the demolition work and its completion. There is also provision for the tenant to obtain possession back if the landlord failed to carry out the work of demolition. When so many conditions have been specifically provided I do not see any justification for importing by implication a further condition regarding the age or the dilapidated nature of the building as a necessary condition for eviction. If the crux of the question is the condition of the building, I fail to see how any question of *bona fide* requirement can come into play at all. I am therefore clearly of the opinion that the *bona fide* requirement of the landlord can be proved either by proof of the bad condition of the building or by other circumstances, such as the means of the landlord etc.

It only remains to refer to the English law and the relevant decisions which have been rendered under the Landlord and Tenant Act of 1954 (2 and 3 Eliz. 2, c. 56). Several statutes have been enacted in England from time to time for regulating the rights and obligations between landlord and tenant like Fixation of Fair Rent Act, Eviction of Tenants etc. Section 26 in the Act of 1954 provides that at the termination of a prior tenancy the tenant is entitled to apply for a statutory renewal of the tenancy. If the Court orders the grant of a new tenancy it shall be for such a period as may be agreed to between the parties or as determined by the Court to be reasonable in all circumstances not exceeding 14 years. Section 30 (1) (*a*) to (*g*) contain the grounds on which a landlord can oppose the tenants' application for renewal of tenancy. A comparison of those provision with the provisions of sections 10 to 14 of Madras Act XVIII of 1960 shows that the grounds mentioned in section 30 of the English Act are the grounds on which a landlord can seek eviction, like default in the payment of rent, unauthorised sub-letting, acts of waste, requirement of alternative or other accommodation etc. One of the grounds is that contained in section 30 (1) (*f*) which runs as follows :

> " That on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding of a substantial part of those premises or to carry out substantial work of construction on the building or part thereof and that he could not reasonably do so without obtaining possession of the holding ; "

In *Fisher* v. *Taylors Furnishing Stores Ltd.*,[1] the tenant's application for the grant of a new lease of the shop was opposed by the landlord under section 30 (1) (*f*) on the ground that the landlord intended to demolish and reconstruct the premises. The County Court Judge took the view that if the tenant was evicted that would enable the landlords to occupy the premises for the purpose of their own business under section 30 (1) (*g*) for which they could otherwise be barred by reason of the statutory provision in the English Act that a purchaser within five years of his purchase would not be entitled to obtain possession of the premises. In other words the County Court took the view that the genuine intention of the landlord to demolish

1. (1956) 2 All E.R. 78.

the premises was offset by the circumstance that the landlord would thus be able to circumvent the provision which would preclude a purchaser from obtaining possession within five years of his purchase. The Court of Appeal did not agree with this view and held that the tenant was not entitled to the renewal and that the landlord was entitled to obtain possession of the building for demolition. Denning, L.J. observed as follows at page 79 :

> " So he puts forward a case for reconstruction under section 30 (1) (*f*), hoping to get possession on that ground. In such circumstances the Court must be careful to see that section 30 (1) (*f*) is fully satisfied before it allows him to get possession. For this purpose the Court must be satisfied that the intention to reconstruct is genuine and not colourable ; that it is a firm and settled intention, not likely to be changed ; that the reconstruction is of a substantial part of the premises, indeed so substantial that it cannot be thought to be a device to get possession ; that the work is so extensive that it is necessary to get possession of the holding in order to do it ; and that it is intended to do the work at once and not after a time. Unless the Court were to insist strictly on these requirements, tenants might be deprived of the protection which Parliament intended them to have. It must be remembered that, if the landlord, having got possession, honestly changes his mind and does not do any work of reconstruction, the tenant has no remedy. Hence the necessity for a firm and settled intention."

Morris, L.J., put the matter thus at page 81 :

> " Section 31 (1) provides :
>
> If the landlord opposes an application under section 24 (1) of this Act on grounds on which he is entitled to oppose it in accordance with the last foregoing section and establishes any of these grounds to the satisfaction of the Court the Court shall not make an order for the grant of a new tenancy.
>
> Words to be noted are 'and establishes any of those grounds to the satisfaction of the Court'- In the present case the first of the two findings of the learned County Court Judge were as follows :
>
> 1. That on the determination of the tenancy at Christmas 1955, the respondent landlords do intend to demolish the whole of No. 72.2. That they cannot reasonably do so without obtaining possession of the holding.
>
> Why then should the landlords not succeed in opposing their tenant's application ? Counsel for the tenant submits two reasons. In the first place he submits that a landlord can only succeed in his opposition under section 30 (1) (*f*) if the proposed works owe their planning and inception to the dictates of sound estate management, or, stated otherwise, if, viewed in detachment and unrelated to any intention to occupy, the landlord has the objective aim of protecting the asset of which he is owner. But I do not find in the section any wording which warrants these submissions. The landlord must show that he has an intention as laid down. If he shows that he has that intention and that he could not reasonably carry it out without obtaining possession of the holding, then he succeeds in his opposition".

Rejecting a similar argument based upon the condition of the building or the prudence of the landlord's requirement, Parker, L.J., observed as follows at page 85 :

> "Counsel for the tenant, however, urged that, in order to rely on para. (*f*), the landlord must show that his intention to do the work is based on principles of good business management or of sound economics. Again I can see no warrant for introducing any such implied limitation on the express words of the paragraph. No doubt if a landlord alleged an intention to pull down perfectly sound and useful buildings, that intention would be suspect and make it harder for him to establish the genuineness of his alleged intention, but it is another thing to say that, however genuine his intention, he cannot succeed unless he can show that the proposed work is consistent with good business management."

From this decision it follows that if the requirement of the landlord is proved to be genuine and not spurious or spacious he will be entitled to obtain an order for eviction.

The same view was taken in a latter decision of the Court of Appeal in *Craddock* v. *Hampshire C.C.*[1], and the earlier decision of the Court of Appeal, referred to earlier was applied. In that case the tenant contended that the landlord's objection under section 30 (1) (*f*) was not based upon a genuine intention to demolish but the landlords were only pretending to say so. Lord Evershed, M.R., rejected the argument in the following words :

> " It would still be open to the tenant to say that the intention to demolish was not really a genuine intention at all—that the Council were not concerned to demolish; they were only pretending to say so because they wanted to throw this property into an agricultural holding, and knew that unless they said that they were going to demolish they would not succeed in establishing the objection under the

1. (1958) 1 All E.R. 449.

section. The short answer to any suggestion of that kind (and Counsel for the tenant did not contend to the contrary) is that the learned Judge held that there was here proved a genuine intention, a firm and settled intention, on the County Council's part to demolish."

It is unnecessary to burden this judgment with a citation of other English decisions. It is sufficient to state that the principle that emerges from the English decisions is that a landlord is entitled to obtain eviction if he establishes a genuine *bona fide* intention to demolish even though ultimately a landlord after obtaining possession may be using the building for his own business purposes which latter purpose if relied upon would not have entitled the landlord to obtain eviction. In other words, a *bona fide* genuine intention and reasonable requirement cannot be off set by collateral consequences.

For all these reasons I am of opinion that the landlady is entitled to an order for eviction in all the four cases. C.R.P. Nos. 1337, 1338 and 1342 of 1964 are allowed and C.R.P., No. 1255 of 1964 is dismissed and all the four petitions filed by the landlady are ordered. Parties shall bear their own costs throughout. Time for vacating till 31st May, 1965, for all the four tenants.

V.K. ——— *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN AND MR. JUSTICE M. NATESAN.

Muthiah Asari and others .. *Appellants**

v.

P. Madasami Asari and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (*XXII of* 1959), *section* 107—*Constitution of India* (1950), *Article* 26 (d)—*Denominational religious institution belonging to members of defined community—Right to management—In whom vests.*

Civil Procedure Code (*V of* 1908), *section* 100—*Findings of fact—Interference in Second Appeal.*

The Pancha Brahma Ambika Mutt Sri Subramania Swami Temple situate in Sattankulam Kasba, though indisputably denominational in character does not belong merely to the Viswa Karma Brahmin community members of certain villages, or of five named villages, but to the members of that community in the district as a whole. Undoubtedly, it is this corporate body which will have the right to manage the temple and to administer its endowments presumably through the elected trustees. Undoubtedly the rights of this body will be entitled to protection under Article 26 (*d*) of the Constitution of India. The right of any corporate body, with regard to a denominational religious institution, to have its functions preserved from invasion under Article 26 of the Constitution has been statutorily embodied in section 107 of Madras Act XXII of 1959. If this right of a denomination or a section thereof is adversely affected by a statute the relevant provision of the statute must be struck down as a whole and in its entirety. The Area Committee will have no right to nominate trustees to the management of a denominational religious institution or for the administration of its properties. The fact that the Area Committee purported to nominate members of the particular religious denomination will not be enough to cure the vice or infirmity if otherwise the right guaranteed to this body under Article 26 (*d*) of the Constitution are effectively taken away by the nomination.. But the Area Committee and the Commissioner of Hindu Religious and Charitable Endowments will have discretion to decline to accept the elected candidates who suffer from any specific unsuitability or infirmity unfitting them from office. But subject to this restriction it is the corporate body that has to elect trustees for the administration and management of the temple and its properties.

The High Court in exercise of its jurisdiction with regard to Second Appeal will have no power to interfere with an explicit finding of fact based on appreciation of evidence even if it is of the view that the finding is erroneous.

Appeal under Clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. Justice Kunhamed Kutti, dated 7th March, 1963, and passed in S.A. No. 551 of 1960 preferred against the decree of the Court of the Subordinate Judge of Tuticorin in A.S. No. 43 of 1957 (O.S. No. 40 of 1956 on the file of the District Munsif's Court, Srivaikuntam).

S. Sitarama Ayyar and *S. Rajaraman,* for Appellants.

The Government Pleader *A. Alagiriswami, U. Somasundaram, P. Kothandaraman* and *R. Sitaraman,* for Respondents.

* L.P.Appeal No. 104 of 1963. 11th February, 1965.

The Judgment of the Court was delivered by

Anantanarayanan, J.—This Letters Patent Appeal is by the appellants in S.A No. 551 of 1960, before Kunhamed Kutti, J. They were also the plaintiffs in O.S. No. 40 of 1956 on the file of the learned District Munsif of Srivaikuntam. They sought for a declaration that the Pancha Brahma Ambika Mutt Sri Subramania Swami Temple situate in Sattankulam Kasaba, and endowments or properties attached thereto, belonged to members of the Pancha Brahmaviswa Brahmin Community residing in five named villages, and that that community as a body was entitled to manage the institution and its properties, free of interference by the Commissioner for Hindu Religious and Charitable Endowments, the first defendant in suit, or of the other defendants inclusive of trustee nominated by the Area Committee. The suit was originally decreed by the trial Court, on the basis that the temple was a denominational institution and that the Commissioner (first defendant) or the Area Committee had no right to appoint trustees either to manage the religious institution, or to administer the properties. Ultimately, after certain vicissitudes of trial that need not concern us, the suit was dismissed by the learned Subordinate Judge in First Appeal. Kunhamed Kutti, J., went into the facts in detail, and also the relevant provisions of law that could apply to the controversy, inclusive of Article 26 of the Constitution, and came to the conclusion that the First Appellate Court was correct, and that the Second Appeal should be dismissed. However, leave was granted by the learned Judge and hence the Letters Patent Appeal by the unsuccessful plaintiffs now before us.

With regard to the actual facts, there has been some difficulty, and it appears to us that some degree of vagueness and confusion is evident in the record. However, when arguments were submitted before us by the learned Counsel for the appellant and the learned Government Pleader, it became fairly clear that the main conclusion of fact could not be disturbed in Second Appeal, and that it is specific in character. We do not think it is necessary to set forth here the decisions of the Supreme Court to the effect that this Court, in exercise of its jurisdiction with regard to Second Appeals, will really have no power to interfere with an explicit finding of fact based on the appreciation of evidence; that is the case, even if this Court might have felt inclined to arrive at a different conclusion on the merits, on an independent appreciation of the evidence; in other words, even if this Court were of the view that the finding of fact was erroneous. In certain decisions, the matter has even been expressed in the acute form that this Court would have no jurisdiction, in Second Appeal, to interfere with a finding of fact, pure and simple, though deemed to be erroneous. We think it is sufficient, here, to set forth the main finding of fact in this suit in the very words of the First Appellate Court. Those passages are as follows :—

"Thus the exclusive right of the five village people has not been established and the right of the Viswa Karma Brahmin Community of the district has not been negatived even by the trial Court as there is no evidence at all to that effect."

Again

"All the members of the Viswa Karma Brahmin Community are entitled to have an interest in the suit institution."

Thus, we may take it as established on the evidence that this religious institution, though indisputably denominational in character, does not belong merely to the Viswa Karma Brahmin community members of certain villages, or of five named villages, but to the members of that community in the district as a whole. Undoubtedly, it is this corporate body which will have the right to manage the temple and to administer the endowments, presumably through the elected trustees; undoubtedly the rights of this body will be entitled to protection under Article 26 of the Constitution, particularly sub-clause (*d*). The right of any corporate body, with regard to a denominational religious institution, to have its functions preserved from invasion, under Article 26 of the Constitution, has been statutorily embodied in section 107 of Madras Act XXII of 1959.

It is really not necessary for the present restricted purpose, to deal with the case-law at any great length. The learned Judge himself referred to the following decisions as relevant. *Commissioner, Hindu Religious Endowments, Madras* v. *Sri Lakshmindra Tirtha Swamiar of Sri Shirur Mutt*[1], *Ratilal Panchand Gandhi* v. *State of Bombay*[2] and *Devaraja Shenoy* v. *State of Madras*[3]. In addition our attention has been drawn to two decisions of importance upon the actual principle, one of which is *Durga Committee* v. *Hussain Ali*[4] and the other is *Mukundaraya* v. *State of Mysore*[5], a Bench decision. Actually the last decision deals with the precise point whether, with regard to a denominational temple which belongs to a corporate body like the members of a defined community, the State would be within its power in applying a provision like section 41 of the Madras Hindu Religious and Charitable Endowments Act, 1951, corresponding to section 49 of Act XXII 1959 and thereby enabling the Area Committee, an external body, to nominate trustees to the management of such denominational religious institution, or for the administration of its properties.

We might very briefly state that, in the present case, we are not deciding the wider question whether section 49 is *ultra vires* the powers of the Legislature, if sought to be applied to denominational temples or religious institutions, in the light of Article 26 (*d*) of the Constitution. It is sufficient for us to observe that both in the Mysore decision that we have earlier referred to, and in *Durga Committee* v. *Hussain Ali*[4] the relevant criterion has been expressed in explicit language. In the Mysore Case, the Bench observed that if the effect of certain provisions was to totally take away the right of administration from the hands of the religious denomination and to vest such right in other authorities, this would be a violation of rights guaranteed under Article 26 of the Constitution. In the Supreme Court decision it is stated :

> ' If the right of a denomination or a section of such denomination is adversely affected by the statute, the relevant provision of the statute must be struck down as a whole and in its entirety or not at all..........In other words, the infirmity or the vice in the statute cannot be cured by confining the members of the proposed committee to the denomination itself."

We think it is sufficient to point out the position at law for the facts of the present case make it abundantly clear that there is no need, in the immediate context, to strike down any provision of law in the 1959 Act as *ultra vires* in view of rights guaranteed under Article 26 of the Constitution. Certainly, the fact that the Area Committee purported to nominate members of the particular religious denominations will not be enough to cure the vice or infirmity, if otherwise the rights guaranteed to this body under Article 26 (*d*) are effectively taken away by the nomination. But the matter seems to be academic at the moment, since the terms of the members who were previously functioning as trustees, we shall assume as *de facto* trustees have come to an end. The temple, we must reiterate, belongs to the entire body of the Viswa Karma Brahmin community of the district, and not merely to members of the five named villages or certain villages. The interim powers of the Commissioner or the Area Committee to make arrangements for the day-to-day administration of the temple and its endowments are not in dispute. Hence, we direct that such arrangements be made, as appear feasible and expedient. In the meantime, it is obvious that an electoral roll has to be prepared of the members of this community in the district, which form a corporate body in whom are vested relevant rights under Article 26 of the Constitution. If such a roll is prepared, some kind of an electoral meeting has to be convened, or an electoral college has to be formed and two or three trustees, as convenient, will have to be elected by the electorate. Certainly, the Area Committee and the Commissioner will have discretion to decline to accept the elected candidates who suffer from any specific unsuitability or

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1. 1954 S.C.J. 335 : (1954) 1 M.L.J. 596 : 1954 S.C.R. 1005.
2. 1954 S.C.J. 480 : (1954) 1 M.L.J. 718 : 1954 S.C.R. 1055.
3. (1952) 2 M.L.J. 481.
4. A.I.R. 1961 S.C. 1402.
5. A.I.R. 1960 Mys. 18.

infirmity unfitting them from office ; in that case, election may have to be held again in that particular respect. But subject to this restriction, it is the corporate body that has to elect trustees for the administration and management of the temple and its properties. Such arrangement may be carried out by the authorities under the directions of the Commissioner (first defendant) after the proper interval of time ; in the meantime, the interim arrangements will continue to be enforced.

With this clarification, we allow the Letters Patent Appeal to this restricted extent. It is otherwise dismissed. The parties will bear their own costs throughout.

V.K. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

The Municipal Council, Melapalayam through its Commissioner .. *Appellant* *

v.

V. S. T. Sheik Mansoor and two others .. *Respondents.*

Madras District Municipalities Act (V of 1920), section 262-A—Licence fees in private markets at 15 per cent of income—Validity—Quantum of—Relation to the service rendered—Need for—Difference between tax and fee—Levy if can be sustained as a tax.

A tax and fee are different in their nature and purpose. While a tax is a general levy unrelated to any particular object, a fee is essentially in the nature of a compensation for special services rendered by the Government or local body. Though it is not possible to expect an exact equation between the levy and the services, still in cases of licence fees the fee levied should be commensurate in their quantum with the expenses incurred in rendering the services. What is levied by a local body under section 262-A of the Municipalities Act is only a fee and not a tax and a levy of 15 per cent of the gross income as licence fee for a private market without rendering any corresponding service is not valid.

Municipal Council, Tiruvarur v, Md. Abu Baker, I.L.R. 1944 Mad. 405 : (1943) 2 M.L.J. 496 *held not good law.*

Though the law in relation to local bodies is enacted and justified as coming within the purview of Entry 5 of List II, any provision therein delegating to the local body the authority to levy a tax or licence fee must be related to one or the other topic of legislative powers in List II where the State Legislature is concerned. There is no Entry in List II which empowers the State Legislature to levy a tax on the private market or the income from it. Therefore it cannot be argued that the fee levied under section 262-A of the Municipalities Act was not that but a tax.

Appeal against the Decree of the District Court of Tirunelveli, dated 6th September, 1961 in Appeal Suit No. 66 of 1961, preferred against the decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 129 of 1960, etc.

A. Alagiriswami (The Government Pleader) for Appellant.

T. Martin, for Respondents.

When the Second Appeal and Civil Revision Petitions came on for hearing before him in the first instance the following Order of Reference was made by

Kailasam, J.—The Second Appeal and the two Civil Revision Petitions arise out of three suits instituted by the Municipal Council, Melapalayam, through its Commissioner for recovery of licence fees for private market kept by the defendants in the respective suits. In the Second Appeal (S.A. No. 624 of 1962) the Municipality sued the defendants for licence fees for private market for the financial years 1956-57, 1957-58, 1958-59. The suit was resisted by the defendants on the ground that the licence fee which was fixed at 15 per cent of the gross income was illegal as the Municipality did not spend any money for the upkeep of the market and the fee was not commensurate with the services rendered. The trial Court found that the fee levied by the Municipality was legal under section 262-A of the District Municipalities Act and granted a decree as prayed for. On appeal by the defendants

* S.A. No. 624 of 1962 and
C.R.P. Nos. 579 and 2414 of 1961. 19th February, 1965.

the District Judge came to the conclusion that the fee levied by the Municipality was not commensurate with the services rendered and as such the levy was illegal and therefore the plaintiff was not entitled to a decree as prayed for. In the Second Appeal by the Municipality the Government Pleader fairly conceded that the general law is that the fee levied should be commensurate with the services rendered by the Municipality. But he contended that there is a Bench decision of this Court reported in *Tiruvarur Municipality* v. *Md. Abu Baker*[1] in which it was held that the effect of section 262-A of the District Municipalities Act is to alter the law as rendered in the Privy Council Judgment in *Pazundaung Bazar Co. Ltd.* v. *Municipal Corporation of Rangoon*[2] and that the object of the amended section was to put an end to constant litigation with regard to charges levied by the municipal authorities and a licence fee not exceeding 15 per cent of the gross income can be legally charged by the Municipality. In *Pazundaung Bazar Co. Ltd.* v. *Municipal Corporation of Rangoon*[2] it was held that the Corporation of Rangoon had fixed the scale of licence fees taking into consideration the expenses that might be incurred for the special services necessitated by the duties and liabilities imposed upon it and therefore the levy was legal.

It is not disputed that it has been held in several cases that the fee levied should be commensurate with the services rendered by the Municipality. In *Annamalai Bus Transport* v. *Dharapuram Municipality*[3], Rajagopalan, J. dealing with a levy by the Municipality under Section 270-E (5) of the District Municipalities Act held that the fee must bear a just and reasonable proportion to the services rendered by the Municipality. The decision of the Bench in *Tiruvarur Municipality* v. *Md. Abu Baker*[1] was not brought to the notice of the learned Judge. The Supreme Court in *Hingir Rampur Coal Co.* v. *State of Orissa*[4] observed :

> "In regard to fees there is, and must always be, co-relation between the fee collected and the services intended to be rendered. Cases may arise where under the guise of levying a fee, Legislature may attempt to impose a tax; and in the case of such colourable exercise of legislative power, Courts would have to scrutinise the scheme of the levy very carefully and determine whether in fact there is a co-relation between the services and the levy, or whether the levy is either not co-related with service or is levied to such an excessive extent as to be a pretence of a fee and not a fee in reality."

In *Krishnarao Pradhan* v. *Jasjit Singh*[5] it was held that a fee is an amount collected to reimburse the Government for the expenses of licensing and it must reasonably be measured against the cost which may be entailed in the process of granting licences. The decisions of the Supreme Court referred to above are clear that the fees levied in order to be valid should be commensurate with the services rendered. Learned Government Pleader does not dispute the position of the law. He also did not justify the levy of the licence fee on the ground that it was commensurate with the cost of collection and supervision as it was common ground that no services had been rendered in respect of the market in question by the Municipality. But he pointed out that the only decision which specifically dealt with section 262-A is *Tiruvarur Municipality* v. *Md. Abu Baker*[1] and that decision has not been either expressly or impliedly over-ruled. It has also to be noted that it was observed in *Tiruvarur Municipality* v. *Abu Baker*[1] that the effect of the amendment to section 262-A is to alter the law as laid down in *Pazundaung Bazar Co., Ltd.* v. *Municipal Corporation of Rangoon*[2]. As the decision of the Bench has not been specifically over-ruled, it is binding on me and as the general law is not in conformity with the decision relied on by the learned Counsel, the only course open to me is to place the Second Appeal and the two connected Civil Revision Petitions before my Lord the Chief Justice for being posted before a Bench or a Full Bench as he may deem it necessary.

The Second Appeal and Revision Petitions came on for hearing before a Bench (*Veeraswami* and *Kunhamed Kutti, JJ.*) in pursuance of the above Order of Reference.

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1. (1943) 2 M.L.J. 496: I.L.R. (1944) Mad. 405.
2. I.L.R. (1931) 9 Rang. 440: L.R. 58 I.A. 313 : 61 M.L.J. 740 (P.C.).
3. (1957) 2 M.L.J. 443.
4. A.I.R. 1961 S.C. 459 at 464.
5. (1962) 2 M.L.J. (S.C.) 127: (1962) 2 An. W.R. (S.C.) 127: (1962) 2 S.C.J. 507.

A. Alagiriswami (The Government Pleader), for Appellant.

T. Martin, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The Second Appeal and the Revision Petitions have been posted before us, as Kailasam, J., before whom they came up in the first instance considered that, in view of *Municipal Council, Tiruvarur* v. *Muhammad Abu Baker*[1] they should be decided by a Division Bench. They relate to levy of licence fee on private markets within the limits of the Melapalayam Municipality, in Tirunelveli District. The licence fee levied was computed at 15 per cent. of the gross income of the owner from the market in the preceding year. This was in accordance with section 262-A of the Madras District Municipalities Act, 1920. The Municipality instituted suits for recovery of the arrears of fees payable for the markets of the respondents in the Second Appeal and the petitioners in the Revision Petitions. Their defence was that as a fee it could not be justified on the *quid pro quo* basis. The suits were, however, decreed. In one of them, the respondents concerned preferred an appeal and successfully. It is from this decree in appeal that the Municipality has come up here in Second Appeal. The defendants who have been unsuccessful, have filed the two Revision Petitions.

The common question that arises is, whether the licence fee claimed by the Municipality at 15 per centum is justifiable and legal. It is well settled now that a tax and a fee are distinct and different exactions compulsorily. They differ in their purpose and nature. A tax is a compulsory levy by the Government or local body for purposes of running the Government or the local institution, and the tax collected by the Government goes into what is called the "Consolidated Fund". A tax is not related to any particular object or purpose but is generally devoted for meeting the expenses of the State. But a fee is essentially in the nature of a compensation for special services rendered to particular persons or institutions. Having regard to that nature of the exaction, there should necessarily be a relationship between the exaction and the services rendered. As the fee is a *quid pro quo* for the services rendered by the Government or the local body, which levies the fee, such fee levied should be commensurate in their quantum with the expenses incurred in rendering the services. It is true, of course, that an exact balance or a precise equation is not expected between the two factors, for it is impossible in actual administration. There are several decided cases which lay down these propositions and it is quite needless to refer to them.

In *Municipal Council, Tiruvarur* v. *Muhammad Abu Baker*[1] a Division Bench of this Court justified the levy of fees at 15 per centum of the gross income from a market, without reference to the *quid pro quo* basis. In *Muthuswamy Raja* v. *Kadayanallur Panchayat Union Council*[2] one of us had occasion to refer to this decision and observe that it was not possible to regard it as laying down good law any longer, because it took no notice of the distinction between a tax and a fee. We are of the same view. Realising this position, Mr. Alagiriswami, for the Municipality, wanted to argue that the fee under section 262-A of the Act is really not that but a tax. But he could not pursue the point and sustain it in view of the constitutional position in regard to that matter. There is no entry in List II which empowers the State Legislature to levy a tax on the private market or the income from it. It is obvious that though the law in relation to local bodies is enacted and justified as coming within the purview of Entry 5 of List II, any provision therein delegating to the local body the authority to levy a tax or licence fee must be related to one or the other topic of legislative powers in List II, where the State Legislature is concerned. Since that test cannot be applied successfully, it follows that what is levied under section 262-A is not a tax.

Since no attempt appears to have been made by the Municipality to justify the licence fee imposed on the *quid pro quo* basis, it follows the Second Appeal should

1. (1943) 2 M.L.J. 496 : I.L.R. (1944) Mad. 405.
2. (1964) 77 L.W. 723.

fail, and the Revision Petitions should succeed. The Second Appeal is dismissed and the Revision Petitions are allowed. No costs.

R.M.

Appeal dismissed;
Revision Petitions allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Original Testimonitary Jurisdiction).

PRESENT :—MR. JUSTICE R. SADASIVAM.

[*In the matter of* the Will of Puzhal Sami Chettiar (*deceased*).]

Vijayakumari .. *Petitioner* *

v.

P. G. Ellappa Chettiar .. *Respondent.*

Original Side Rules (Madras High Court), Order 25, rule 62—Provision for registration of petition for grant of probate or letters of administration as a suit under—By whom can be invoked—Cannot be invoked by person failing to file an affidavit within eight days after entering caveat on service of notice.

Order 25, rule 62 of the Original Side Rules (Madras High Court) provides that if subsequent to the grant of probate or letters of administration, any person interested in the property of the deceased, other than the grantee, desires that the will may be proved in solemn form or that the said grant may be revoked, he shall file an affidavit setting out the grounds therefor and apply for the issue of a citation to the grantee and that the petition for probate or letters of administration shall be registered and numbered as a suit. The rule contemplates the person interested not only filing an affidavit but also making an application. Further, this rule could be invoked only by a person who comes to know of the grant of probate or letters of administration made without his knowledge. Thus where a person who after being served with notice or otherwise taking notice enters caveat he should file an affidavit within eight days. If he fails to do so he cannot take advantage of his default and subsequently come forward with an affidavit and ask for the petition to be registered as a suit under Order 25, rule 62.

Application in T. O. S. No. 14 of 1964 to strike off written statement filed by respondent in petition filed for grant of letters of administration with the will annexed.

T. R. Ramachandran, for Applicant.

P. V. Gopalaratnam, for Respondent.

The Court delivered the following

JUDGMENT.—Application by the petitioner in O.P. No. 155 of 1964 and plaintiff in T.O.S. No. 14 of 1964 to strike-off the written statement filed by the respondent Ellappa Chettiar. The applicant filed O.P. No. 155 of 1964 for grant of letters of administration with the will of Puzhal Sami Chettiar annexed limited to the properties bequeathed to Tulukanammal. I ordered notice to Veerammal, Ellappa Chettiar, Vembuli Ammal and Ellammal among the persons mentioned in paragraph 13 of the petition as next of kin according to Hindu Law. Ellappa Chettiar entered caveat on 10th July, 1964, and it was taken on file on 24th July, 1964. On 24th September, 1964, I passed orders discharging the caveat under Order 25, rule 54, Original Side Rules, as Ellappa Chettiar failed to file an affidavit in support of the caveat within eight days as required by the Rules. The learned Advocate for Ellappa Chettiar brings to my notice that he had filed the necessary affidavit on 1st August, 1964, that it was ordered to be returned on 10th August, 1964, and that he did not take it back and re-present it. He merely filed an affidavit on 27th October, 1964. On the strength of this affidavit the First Assistant Registrar has on 7th Novermber, 1964, ordered the Original Petition to be registered as a suit and it was registered as T.O.S. No. 14 of 1964. It should be noted that in the meanwhile on 22nd October, 1964, I granted letters of administration with the will of Puzhal Sami Chettiar annexed limited to the property bequeathed to Tulukanammal as prayed for by the petitioner on her furnishing security for the value of the same.

The procedure adopted by the First Assistant Registrar is not correct. The learned First Assistant Registrar relied on Order 25, rule 62 of the Original Side Rules for ordering the Original Petition to be registered as a suit. The rule provides that if subsequent to the grant of probate or letters of administration, any person

* Appln. No. 76 of 1965 in T.O.S. No. 14 of 1964. 5th March, 1965.

interested in the property of the deceased, other than the grantee, desires that the will may be proved in solemn form or that the said grant may be revoked, he shall file an affidavit setting out the grounds therefor and apply for the issue of a citation to the grantee and that the petition for probate or letters of administration shall be registered and numbered as a suit. The rule contemplates the person interested not only filing an affidavit but also making an application. Such an application has not been filed by Ellappa Chettiar. Further this rule could be invoked only by a person who comes to know of the grant of probate or letters of administration made without his knowledge. This is clear from a reading of the earlier rules as to the procedure to be adopted in case of persons who contest the proceedings. Thus where a person who after being served with notice or otherwise taking notice, enters a caveat, he should file an affidavit within eight days. This is what Ellappa Chettiar has attempted to do in this case. He cannot take advantage of his own default in not re-presenting the affidavit and allowing further proceedings to take place and come forward with an affidavit and ask for the petition to be registered as a suit under Order 25, rule 62 of the Original Side Rules. The scheme of the rules does not permit him to take such a course. If the view taken by the learned First Assistant Registrar is accepted, every person who fails to file an affidavit within eight days after entering caveat on service of notice could subsequently come forward with an application under Order 25, rule 62 of the Original Side Rules. The remedy of the applicant is to apply to this Court to excuse the delay in re-presenting the affidavit after setting aside the orders dated 24th September, 1964 and 22nd October, 1964. The learned Advocate for the respondent wants time to file the necessary application.

When this application came up for hearing on the last occasion (22nd October, 1964) I told the learned Advocate for the applicant that before he could proceed with the application he should apply to set aside the order of the First Assistant Registrar directing the O.P. No. 155 of 1964 to be registered as T.O.S. No. 14 of 1964 on the file of this Court. It appears that such an application has been filed. This application is directed to be posted along with the said application.

V.K. *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE T. VENKATADRI.

A. S. Shaik Mohamed Maracayar .. *Petitioner**

v.

G. Mohideen Kutty .. *Respondent.*

Criminal Procedure Code (*V of* 1898), *sections* 476, 479-*A*—*Scope*—*Offences under sections* 191, 192, 193 *and* 465 *of Penal Code* (*XLV of* 1860)—*Resort to section* 476 *of Criminal Procedure Code* (*V of* 1898)—*Propriety.*

Where after the conclusion and after the judgment was delivered in certain proceedings before the Chief Rent Controller for the fixation of fair rent in respect of certain premises, during the course of which the landlord filed two documents in support of his case which were found to have been fabricated by him, the tenant filed an application praying for an order directing institution of a complaint under sections 195 and 476 of Criminal Procedure Code and the Rent Controller made an order directing a complaint to be filed against the landlord under sections 195 and 476 of the Criminal Procedure Code for offences under sections 191, 192, 193 and 465 of the Penal Code ;

Held, the application filed by the tenant for instituting a complaint against the landlord was not maintainable in view of section 479-A of the Criminal Procedure Code under which a complaint for an offence under section 193 read with sections 191 and 192 of the Penal Code could be filed only at the stage when the judgment or order in the case was being pronounced.

The special procedure of section 479-A is prescribed for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceedings or for fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding and when an offence falls within the purview of section 479-A resort cannot be had to section 476. But the offences of forgery (punishable under section 465 of the Penal Code) and of fabrication of false evidence for the purpose of using it in a judicial proceeding are distinct and within the description of fabrication of false evidence for the purpose specified in section 479-A, the offence of forgery is not included. The tenant in the instant case will therefore be entitled to file a fresh application under section 476 of the Criminal Procedure Code for directions to file a complaint against the landlord for the offence under section 465 of the Penal Code without prejudice to his rights if any.

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* C.R.P. No. 2131 of 1963. 5th March, 1965

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of Small Causes at Madras dated 11th December, 1963 and made in H.R.A. No. 830 of 1962 (I.A. No. 678 of 1962 in H.R.C. No. 4968 of 1958, Rent Controller, Madras).

V. S. Ramakrishnan, for Petitioner.

J. S. Athanasius, for Respondent.

The Court made the following

ORDER.—This Revision Petition is filed by the landlord against the order directing a complaint to be filed under sections 195 and 476, Criminal Procedure Code, against the landlord-petitioner for offences under sections 191, 192, 193 and 465, Indian Penal Code.

The petitioner is the landlord of premises No. 206, Angappa Naick Street and the respondent is his tenant. The respondent filed H.R.C. No. 4968 of 1958 before the Chief Rent Controller for fixation of fair rent in respect of the said premises. The petitioner contested this application and in the course of the proceedings he filed Exhibit R-4 purporting to be an office copy of the notice dated 28th February, 1959, calling upon the respondent to furnish a list of his sub-tenants and the rents collected from them and Exhibit R-5 purporting to be a reply sent to the landlord by the tenant and said to have been signed by the dismissed clerk of the tenant stating that on an average about Rs. 400 was being collected from the sub-tenants. It was found after an elaborate enquiry that these two documents Exhibits R-4 and R-5 were not genuine documents but had been fabricated by the landlord to support his case that a sum of Rs. 275 would be the fair rent. A fair rent of Rs. 200 per month was fixed after inspection of the premises. There was an appeal by the landlord, where also the learned Judge after discussing the evidence held that Exhibits R-4 and R-5 were spurious documents. The matter came up in revision before Jagadisan and Srinivasan, JJ., and the learned Judges while confirming the finding of the lower Courts that Exhibits R-4 and R-5 are spurious documents also observed that :

"Instances where a party to an action is found to have produced forged and fabricated documents should not be allowed to pass machanically but should be dealt with in an appropriate and deterrent manner."

After these proceedings came to an end, the tenant filed I.A. No. 678 of 1962 out of which this Revision arises praying for an order directing the institution of a complaint under sections 195 and 476, Criminal Procedure Code, against the landlord for the offences aforesaid. The Rent Controller found that an offence under section 196 read with section 192 had been made out against the landlord and directed that a complaint be filed against him before the Chief Presidency Magistrate Madras. On appeal filed by the landlord, the Second Judge, Court of Small Causes, confirmed the finding of the Rent Controller. This Revision Petition is filed by the landlord against the dismissal of his appeal.

Learned Counsel appearing for the landlord-petitioner contended before me that the application filed by the tenant for instituting a complaint against the landlord is not maintainable in view of section 479-A, Criminal Procedure Code, which provides that a complaint ought to have been filed at the time of delivery of the judgment and that section 476, Criminal Procedure Code is not also applicable. It is urged that there was undue delay of one year and 10 months in taking these proceedings against the landlord. Further it is contended that the Rent Controller has no jurisdiction to pass an order under section 476 as he has become *functus officio* after the disposal by him of the application for fixation of fair rent.

The main point for consideration is whether the application of the tenant is not maintainable in view of section 479-A, Criminal Procedure Code, as a complaint was not filed at the time of delivery of the judgment. The provisions of this section are special provisions relating to the offence of forgery, and fabrication of false evidence by witnesses and are self-contained. Section 479-A provides that the stage at which a proceeding for filing a complaint should be taken is the stage when the judgment or the order in the case is being pronounced.

The Supreme Court had occasion to consider the scope of section 479-A in *Shabir Hussain* v. *State of Maharastra*[1]. The facts in that case are these :

The appellant before the Supreme Court, who was a witness for the prosecution, gave contradictory statements before the Committal Court and the Sessions Court during a murder trial The Sessions Judge at the end of the trial passed an order directing the Registrar of the Sessions Court for Greater Bombay to take proceedings against the witness for prosecuting him for perjury. In pursuance of this order a notice was issued to the appellant requiring him to show cause why he should not be prosecuted under section 193, Indian Penal Code, for making contradictory statements regarding the same incident. After hearing the appellant's Counsel, the Sessions Judge ordered the complaint to be filed. At the trial before the Chief Presidency Magistrate, the appellant raised an objection that the provisions of section 479-A, Criminal Procedure Code, had not been complied with by the Additional Sessions Judge and that consequently the Chief Presidency Magistrate could not take cognisance of the offence. The Chief Presidency Magistrate upholding the objection discharged the appellant. The Revision preferred by the State was allowed by the High Court and the High Court set aside the discharge of the appellant and remanded the case for trial by the Chief Presidency Magistrate. The High Court while remanding the case observed that though the provisions of section 479-A, Criminal Procedure Code, had not been complied with, it was still open to the Chief Presidency Magistrate to take action on the complaint under sections 476 to 479 of the Code of Criminal Procedure. Against the order of the High Court the appellant preferred an appeal to the Supreme Court. Dealing with the scope of sections 479-A and 476, Criminal Procedure Code, the Supreme Court observed at page 820 :

"It is not as if ...... that the Court has an option to proceed under either section 479-A or under section 476 and that if it does not take action under section 479-A it can do so under section 476. The jurisdiction of the Court to make a complaint against a person arises only from the fact that that person has given false evidence or fabricated false evidence at any stage of the proceeding disposed of by it. The conditions required to be fulfilled by the Court and the procedure to be followed by it for the purpose of exercising its jurisdiction and making a complaint are not to be equated with the conditions which give the Court jurisdiction to make a complaint. From this it would follow that whereas section 476 is a general provision dealing with the procedure to be followed in respect of a variety of offences affecting the administration of justice, in so far as certain offences falling under sections 193 to 195 and section 471, Indian Penal Code, are concerned the Court before which that person has appeared as a witness and which disposed of the case can alone make a complaint."

The Supreme Court held that the Chief Presidency Magistrate was right in discharging the appellant and set aside the order of the High Court remanding the case for trial by the Chief Presidency Magistrate.

The Supreme Court also considered the scope of section 479-A in *Raghubir Prasad Dudhwalla* v. *Chammanlal Mehra*[2] and observed thus :

"The special procedure of section 479-A is prescribed only for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceedings or for fabrication of false evidence for the purpose of being used in any stage of a judicial proceeding. There is nothing in the section which precluded the application of any other procedure prescribed by the Code in respect of other offences. In applying the principle that a special provision prevails over a general provision, the scope of the special provision must be strictly construed in order to find out how much of the field covered by the general provision is also covered by the special provision. Examining the special procedure prescribed by section 479-A in that light, it is important to notice that the act of intentionally giving false evidence in any stage of a judicial proceeding and the act of fabricating false evidence for the purpose of being used in any stage of a judicial proceeding mentioned in section 479-A of the Code of Criminal Procedure are the acts which are made punishable under section 193 of the Indian Penal Code and cognate sections in Chapter XI ....

It will be unreasonable to read into section 479-A the meaning that where a person who appears to have committed an offence under section 193 of the Indian Penal Code—by giving false evidence or fabricating false evidence—appears to have committed some other offence also, say forgery, for the very purpose of fabricating false evidence, complaint for such other offence also can be made under section 479-A of the Code of Criminal Procedure."

1. (1964) 1 S.C.J. 609 : (1964) M.L.J. (Crl.) 338 : A.I.R. 1963 S.C. 816.
2. (1964) 1 S.C.J. 415 : (1964) M.L.J. (Crl.) 233.

The scope of sections 479-A and 476, Criminal Procedure Code, was again considered in *Babu Lal* v. *State of Uttar Pradesh*[1]. The facts there are the following. In a civil proceeding one Babu Lal, the appellant before the Supreme Court, gave false evidence and relied on a forged document in support of his case. Before the disposal of the suit the plaintiffs had filed an application for action being taken against Babu Lal for giving false evidence before the Court. The Munsif did not dispose of the application by his judgment deciding the suit. After the disposal of the suit the plaintiffs moved the Munsif for an order on their application. The Munsif held that no action could be taken against Babu Lal for the offence of intentionally giving false evidence as such action was barred by section 479-A but in his opinion it was expedient in the interests of justice that a complaint be filed against Babu Lal for offences under sections 463 and 471, Indian Penal Code. Pursuant to this order complaint was filed against Babu Lal charging him with committing an offence under section 471 read with section 463, Indian Penal Code. The order passed by the trial Court was confirmed in appeal by the District Judge and Revision challenging the order was dismissed by the High Court. The matter was then taken up in appeal by Babu Lal to the Supreme Court. The Supreme Court observed at page 727 :

> "It is true that some of the ingredients of the act of fabricating false evidence which is penalised under section 193, Indian Penal Code and of making a false document and thereby committing forgery within the meaning of sections 463 and 464, Indian Penal Code, are common. A person by making a false entry in any book or record or by making any document containing a false statement may, if the prescribed conditions of section 463 are fulfilled, commit an offence of forgery. But the important ingredient which constitutes fabrication of false evidence within the meaning of section 192, Indian Penal Code, beside causing a circumstance to exist or making a false document—to use a compendious expression—is the intention that the circumstance so caused to exist or the false document made may appear in evidence in a judicial proceeding, or before a public servant or before an arbitrator, and lead to the forming of an erroneous opinion touching any point material to the result of the proceeding. The offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding are therefore distinct, and within the description of fabricating false evidence for the purpose specified in section 479-A, Criminal Procedure Code, the offence of forgery is not included. In any event the offence penalised under section 471, Indian Penal Code, can never be covered by sub-section (1) of section 479-A. Therefore for taking proceedings against a person who is found to have used a false document dishonestly or fraudulently in any judicial proceeding, resort may only be had to section 476 of the Code of Criminal Procedure."

Bearing in mind the principles laid down in the above decisions of the Supreme Court, I am of opinion that the application made by the respondent for directing the institution of a complaint under sections 195 and 476, Criminal Procedure Code, against the petitioner for offences under sections 191, 192 and 193 and 465, Indian Penal Code, is not maintainable in view of section 479-A. In this view it is not necessary to consider the other points raised by the petitioner such as undue delay in preferring the application, etc. But in view of the observations of the Supreme Court in *Babu Lal* v. *State of Uttar Pradesh*[1] the respondent will be entitled to file a fresh application under section 476, Criminal Procedure Code, for directions to file a complaint against the petitioner for offences under sections 463 and 464, Indian Penal Code, without prejudice to the rights if any.

The Revision Petition is allowed. No costs.

V.K. *Petition allowed.*

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1. (1964) 2 S.C.J. 424 : (1964) M.L.J. (Crl.) 515 : A.I.R. 1964 S.C. 725 (727).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN.

Visalakshi Ammal .. *Petitioner**

v.

Veerayya Rajaliar and nine others .. *Respondents.*

Civil Procedure Code (V of 1908), section 92—Sanction under—Suit comprising several reliefs some of the nature falling under section 92 and others not—Sanction of Advocate-General not obtained—When could be tried as to reliefs falling outside section 92.

It is no doubt true that where the reliefs sought for in a suit fall within the ambit of section 92 of the Civil Procedure Code, it will have to be struck off the file if the sanction of the Advocate-General has not been obtained as required by the law. But it is equally settled that where such a suit also includes other reliefs which do not fall within the scope of section 92 of the Code, it need not be struck off the file as a whole. Where the reliefs are inextricably mingled the problem is certainly difficult in permitting the plaintiff to elect the relief not vitiated by the lack of sanction as required by section 92. Where there are averments to justify the grant of an independent relief the Court may even permit amendment of the plaint in suitable cases.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge Kumbakonam, dated 11th September, 1963 and made in O.S. No. 39 of 1961.

D. Ramaswamy Iyengar, for Petitioner.

K. R. Krishnaswami Ayyar, for 1st and 2nd Respondent.

S. M. Subramanyam, for 3rd and 4th Respondent.

The Court made the following

ORDER. :—In this revision proceeding instituted by the 1st defendant in the Court below, I have had some difficulty in comprehending the order of the learned Subordinate Judge directing the plaintiffs to elect to proceed with a part of the reliefs prayed for in the suit, after holding that many of the averments in the plaint and several reliefs fall within the ambit of section 92 of the Code of Civil Procedure, and that this suit in respect of a public religious or charitable trust is bad for lack of sanction of the Advocate-General, under that provision of law. As far as I can see, a considerable part of the pleadings in the plaint does relate to alleged acts of misfeasance and malfeasance on the part of the trustee (revision petitioner) who is the managing trustee of the trust, and to such alleged breaches of trust as will disqualify her for the office, if established. In that state of pleadings, there is considerable force in the contention of learned Counsel for the revision petitioner, that the trial Court should really have struck the suit off its file as bad for lack of the requisite sanction. But there is certainly authority for the view that where the reliefs sought for include other reliefs which need not be taken as within the scope of section 92 of the Code of Civil Procedure, the suit , as a whole need not be struck off the file as bad in law. It is sufficient to refer to the decision of the Full Bench in *Appanna Poricha* v. *Narasinga Poricha*[1]. A suit by a co-trustee, as in this case, for joint possession and rendition of accounts, *simpliciter* would not require the sanction enacted in section 92. Where averments which would justify those reliefs, and the reliefs themselves, are inextricably mingled with averments relating to misfeasance and breaches of trust by the trustee in possession, which do fall within section 92, together with a prayer for removal of the trustee on that ground the problem is certainly difficult. Should the Court strike the suit off its file, upon its substantial character, or can the Court afford the plaintiff an opportunity of election of the reliefs, not vitiated for lack of sanction ? Learned Counsel for respondents depends upon the decision of a single Judge of the Calcutta High Court in *S. K. Mitra* v. *H. C. Dey*[2] for the view that because some of the reliefs cannot be granted for non-compliance of section 92, that does not mean that the plaintiff is disentitled to obtain other reliefs, which could be sought for in an ordinary suit.

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* C.R.P. No. 1670 of 1963. 12th March, 1965.

1. (1921) 41 M.L.J. 608 : I.L.R. 45 Mad. 113. 2. A.I.R. 1960 Cal. 558.

But the difficulty here is that a very considerable part of the pleadings does relate to the frame of the suit as against an erring trustee in charge of a public religious trust, who has become disqualified on account of mismanagement and breach of trust. There are stray averments which might justify an independent prayer for rendition of accounts to a co-trustee. There are practically no averments relating to any independent relief for possession such as the alleged exclusion of a co-trustee from management, apart from breach of trust. In this state of the pleadings in my view the only proper course is to direct the plaintiffs to carry out suitable amendments to the plaint, as advised, which will furnish a jural basis for the present frame of suit, namely, as against a co-trustee for delivery of possession, and rendition of accounts, apart from section 92, Civil Procedure Code. After that is done, the revision petitioner should of course, be given opportunity to file an additional written statement on the amended plaint; suitable issues should then be framed, and the suit tried on its merits, as an action independent of section 92, Civil Procedure Code. If plaintiffs do not desire this course, they have no alternative but to withdraw this suit, and to institute a fresh suit after obtaining sanction of the Advocate-General. The order of the Court below is modified accordingly. Parties will bear their own costs.

R.M. — *Order modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

S. Rangaswamy and another .. *Petitioners* *

v.

R. Narayanan ... *Respondent.*

Criminal Procedure Code (V of 1898), sections 369 and 561-A—Court not to alter judgment—Inherent power of High Court—If includes power to review.

Section 561-A of the Criminal Procedure Code does not in any way enlarge the powers under the Code, especially when it is provided in the Code that no Court when it has signed the judgment, shall alter or review the same.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith and in the Memorandum of Grounds in Tribunal Revision Case No. 476 of 1964 on the file of the High Court, the High Court will be pleased to review the judgment of the High Court dated 19th November, 1964 and passed in Criminal Revision Case No. 476 of 1964 presented to revise the judgment of the Court of the Special Honorary Presidency Magistrate, Saidapat, Madras, passed in C.C. No. 8109 of 1963—and acquit the petitioners herein of criminal trespass and order the fine to be refunded.

George Alaxander, for Petitioner.

R. Srinivasan, for Respondent.

S. R. Srinivasan, for the Public Prosecutor, on behalf of the State.

The Court made the following

ORDER :—This petition is filed under section 561-A of the Criminal Procedure Code for reviewing the judgment of this Court passed in Criminal Revision Case No. 476 of 1964. This Court in Revision confirmed the conviction and sentence imposed on the petitioners for the offences of criminal trespass. Under section 369, Criminal Procedure Code, no criminal Court when it has signed the judgment shall alter or review the same expect to correct a clerical error. It is submitted that this section is not applicable to the High Court especially when it is disposing of appeals or Revisions. It has been repeatedly held by this Court from In re *Arum Padayachi*[1] that a criminal Court has no power to review its judgment when once it has been signed. The learned Counsel on the authority of the Full Bench decision in *Saj Narain* v. *State*[2] submitted that the High Court has power to review and recall

1. (1926) 50 M.L.J. 51. 2. A.I.R. 1959 All. 315 (F.B.).

* Crl. Misc. P. No. of 1965
S.R. No. 7916 of 1965 in Crl.R.C. No. 476 of 1964. 15th March, 1965.

or alter its earlier decision in a criminal Revision under section 561-A, Criminal Procedure Code. In a recent decision of the Supreme Court in *Sankath Singh* v. *State of Uttar Pradesh*[1] it was held that the appellate Court has no power to review or restore an appeal which has been disposed of. A Sessions Judge cannot set aside the first order passed in appeal dismissing the appeal when neither the appellants nor their Counsel appeared and cannot order rehearing of the appeal. Construing sections 369 and 424, Criminal Procedure Code, the Supreme Court observed that the appellate Court could not pass an order of rehearing of the appeal in exercise of the inherent powers when section 369 read with section 424 of the Code specifically prohibit the altering or revising of its order by a Court. It was further observed that the inherent powers cannot be exercised to do what the Code specifically prohibits the Court from doing. The learned Counsel submitted that this decision may not be applicable to the exercise of the powers of the High Court as a Court of revision under section 561-A, Criminal Procedure Code. I am unable to accept this contention. Section 561-A, Criminal Procedure Code, does not in any way enlarge the powers conferred under the Code especially when it is provided in the Code that no Court when it has signed the judgment, shall alter or review the same. The Supreme Court in a recent decision in *State of Uttar Pradesh* v. *Mohammed Naim*[2] cited with approval the Privy Council decisions in *Jairam Das* v. *Emperor*[3] and *Emperor* v. *Nazir Ahmed*[4] and held that it is now well settled that the section confers no new powers on the High Court and that it merely safeguards all the existing inherent powers possessed by the Court necessary to secure the ends of justice. The same view is stated by the Supreme Court in *Raghubir Saran* v. *State of Bihar*[5]. It is idle to contend that section 369, Criminal Procedure Code, in not applicable to criminal revisions for the Court exercising its powers of revision under section 439, Criminal Procedure Code, exercises only some of the powers conferred on a Court of Appeal. The powers of revision cannot be stated to be larger than that of a Court of Appeal. In a recent decision of this Court in *Anthony Das* v. *State*[6] Sadasivam, J., also took the view that the High Court has no inherent power to alter or review its own Judgment. I am in respectful agreement with the view expressed by the learned Judge. This petition is dismissed.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI.

S. Rajagopalaswamy Naidu .. *Appellant**

v.

The Bank of Karaikudi Ltd., Karaikudi, formerly the Karaikudi Banking Corporations Ltd., through its power agent Sri K. Ramakrishna Iyer .. *Respondent.*

Transfer of Property Act (*IV of* 1882), *section* 67-A—*Applicability—Conditions to be fulfilled—Two mortgages, one executed by* X *and the other by* X *and* Y *jointly, in favour of same mortgagee—Applicability of section 67-A.*

Usurious Loans Act (*X of* 1908), *section* 3—*Mortgage decree with* 12 % *interest till date of decree—Rate of interest if usurious.*

Civil Procedure Code (*V of* 1908), *section* 35—*Costs—Discretion of Court.*

Section 67-A of the Transfer of Property Act aims at relieving harassment to a mortgagor who has executed more than one mortgage in favour of the same mortgagee. The section prevents such a mortgagee from obtaining on different suits several decrees for forclosure against the same mortgagor. For the application of this section, the mortgagee must be the same and so also the mortgagor. Further, the mortgagee must be able to consolidate the mortgages in his favour executed by the same mortgagor

1. (1963) 2 S.C.J. 374 : (1963) M.L.J. (Crl.) 473 : A.I.R. 1962 S.C. 1208.
2. A.I.R. 1964 S.C. 703.
3. L.R. 72 I.A. 120 : (1945) 2 M.L.J. 40 : A.I.R. 1945 P.C. 94.
4. L.R. 71 I.A. 203 : (1945) 1 M.L.J. 86 : (1945) F.L.J. 48 : A.I.R. 1945 P.C. 18.
5. (1964) 2 S.C.J. 143 : 1964 M.L.J. (Crl.) 373 : (1964) 2 M.L.J. (S.C.) 21 : (1964) 2 An. W.R. (S.C.) 21.
6. (1963) 1 M.L.J. 393 : 1963 M.L.J. (Crl.) 249.

*Appeal No. 139 of 1961. 16th March, 1965.

so that he can get a consolidated mortgage decree instead of obtaining several decrees of the same kind under section 67 of the Transfer of Property Act on the different mortgages.

Where *X* mortgages his property and then joins with *Y* and executes a second mortgage in favour of the same mortgagee charging not merely the property comprised in the first mortgage but also the property of *Y*, the two mortgages cannot be regarded as executed by the same mortgagor and section 67-A will have no application to such a case. The mortgage is one and entire and it is not open for purposes of section 67-A to split up the integrity of a mortgage and on a surgical basis treat the second mortgage as in two parts one relating to the property of *X* and the other to the property of *Y*.

Where a mortgage debt is decreed with 12% interest till the date of decree, the rate of 12% allowed cannot be regarded as usurious or penal contravening the provisions of the Usurious Loans Act.

Costs must follow the event in the absence of any special circumstance. The fact that the mortgagee waited for a long time before filing a suit for the recovery of the mortgage debt with the result that the mortgagor is made to pay a large amount of interest is no ground for refusing the costs of the appeal to the mortgagee, when the appeal filed by the mortgagor against the mortgage-decree of the lower Court fails and is dismissed.

Appeal against the decree of the Court of the Additional Subordinate Judge, Madurai, dated 14th March, 1959, and passed in O.S. No. 33 of 1959.

T. Ramaprasad Rao, *T. M. Seshadri* and *P. Balagopal*, for Appellant.

V. D. Gopal, *R. Sreenivasan* and *V. C. Rangadorai*, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This is a defendant's appeal from a mortgage decree. He had executed the mortgage on 14th October, 1950, charging premises No. 162-A, West Masi Street, Madurai, with the repayment of Rs. 45,000 with interest at 14 annas per hundred rupees per mensem. It was further stipulated that Rs. 5,000 should be paid within a period of six months from the date of the mortgage towards the principal and the balance of the principal should be paid within a period of two years from the inception, and that, on default, interest should be calculated at the rate of 12 per cent. but if there was continued default, interest should be raised to 13½ per cent. Admittedly, the sum of Rs. 5,000 was paid within the time specified, but the balance remained totally unpaid. On 4th January, 1952, the appellant and his wife borrowed Rs. 25,000 and jointly executed a promissory note. On 16th January, 1952, the appellant's wife deposited her title deeds relating to premises No. 162, West Masi Street. This borrowing was therefore on a mortgage by deposit of title deeds. On 25th June, 1952, again, both appellant and his wife mortgaged their respective properties securing repayment of a sum of Rs. 8,850. All the three mortgages were in favour of the plaintiff bank. It instituted O.S. No. 112 of 1953 on the file of the Court of the Subordinate Judge, Madurai, to enforce the last two mortgages and obtained a decree against the appellant and his wife. It appears that this decree has been practically paid. The respondent then instituted on 16th April, 1958, the suit out of which this appeal arises on the foot of the mortgage dated 14th October, 1950. The suit seems to have been resisted by the appellant, who was the sole mortgagor, on the ground that it was barred under the provisions of section 67-A of the Transfer of Property Act, and that, in any case, the stipulation of interest was penal and contravened the provisions of the Usurious Loans Act, 1918. The Court below negatived both the grounds and decreed the suit, but allowing interest only at 12 per cent. till the date of the decree.

The above two grounds have been reiterated before us by Mr. Ramaprasada Rao, learned Counsel for the appellant. He argues that section 67-A of the Transfer of Property Act applies to the suit, because premises No. 162-A were the subject-matter of the suit mortgage as well as the mortgage of June, 1952. He says that the fact that the appellant's wife also had joined in the last mortgage and charged her property too for the whole debt did not make any difference to the fact that so far as premises No. 162-A were concerned, the mortgagor was the same. He further contends that the whole object of section 67-A is to avoid harassment to the same mortgagor when the same mortgagee holds more mortgages than one and can get the same kind of decree for foreclosure under section 76. Though the

argument is somewhat attractive, we are clear it is not sound and cannot be accepted in view of the clear terms of section 67-A. The section reads :—

> "A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage money has become due."

For the application of this section, the mortgagee must be the same and so too the mortgagor. Further, the mortgagee must be able to consolidate the mortgages in his favour executed by the same mortgagor, so that he can get a consolidated mortgage decree instead of obtaining several decrees of the same kind on the different mortgages under section 67. The section, as rightly pointed out by learned Counsel for the appellant, aims at relieving harassment to a mortgagor who has executed more than one mortgage in favour of the same mortgagee. The section prevents such a mortgagee from obtaining on different suits several decree for foreclosure against the same mortgagor. The question in this case is whether the appellant can be regarded as the same mortgagor within the meaning of section 67-A in relation to the mortgage dated 25th June, 1952. It is true that so far as premises No. 162-A are concerned the appellant being the owner thereof, is the same mortgagor. But it must be remembered that the mortgage of 1952 was executed not merely by the appellant but also by his wife jointly in respect of their respective properties. That being the case, obviously, the suit mortgage and the mortgage of 1952 cannot be regarded as having been executed by the same mortgagors. There is also the other point of view, namely, that mortgage is one and entire, and it is not open for purposes of section 67-A to split up the integrity of a mortgage and on a surgical basis treat the mortgage of 1952 as in two parts, one relating to premises No. 162-A and the other to premises No. 162. That clearly is not permissible. We are of the view therefore that where *X* mortgages his property and then joins with *Y* and executes a second mortgage, which charges not merely that property but also the property of *Y*, the two mortgages cannot be regarded as executed by the same mortgagor. *Moro Ragunath* v. *Balaji*[1] and *Rajanikanta* v. *Sotorendra Nath*[2] which have been referred to by the Court below, if we may say so with respect, laid down the correct principle. These are cases where one co-owner executed a mortgage of his share followed by a second mortgage executed by that co-owner with one or more other co-owners on the entire property held in co-ownership, and it was held that the mortgagors were not the same. Mr. Ramaprasada Rao argues that the principle will be different in the case of persons who are not co-owners but independent owners of separate properties. We fail to see any basis for this distinction. In fact, in our view, the principle of these cases applies with greater force to the second category of cases as here. It follows that the appellant's ground based on section 67-A must fail. On that view, it is unnecessary to go into the other question of waiver which the Court below adverted to.

The other contention of Mr. Ramaprasada Rao, for the appellant, is that the penalty clauses providing for double enhancement of interest in cases of defaults are illegal, as the appellant is an agriculturist. We are unable to accept this contention. Let us assume without deciding that the appellant is an agriculturist for the purposes of the Usurious Loans Act. Even so, we do not think that the rate of interest actually allowed by the Court below at 12 per cent. up to the date of the decree can be regarded as usurious or penal. In *Sevugan Chettiar* v. *Chinnasami and another*[3], in which there was a provision for interest at 24 per cent. the rate was held to be penal, but the Division Bench considered that 12 per cent. could properly be allowed. That is what the Court below has done in this case. We can see no reason to differ from it.

The appeal is dismissed. Mr. Ramaprasada Rao has made an impassioned plea that the respondent had waited to institute the suit for such a long time with the result the appellant is made to pay a large amount of interest and that in

1. (1889) I.L.R. 13 Bom. 45.
2. (1934) 38 Cal.W.N. 124.
3. (1959) 1 M.L.J. 181 : A.I.R. 1950 Mad. 654.

view of this we should relieve him of the costs of this appeal. We cannot accede to his request. The costs must follow the event in the absence of any special circumstance. The respondent will be entitled to its costs of this appeal. The appellant will have six months for payment of the decree amount.

V.K. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K.S. RAMAMURTI.

C.N. Nambudiri .. *Petitioner**

v.

Edwin Israel .. *Respondent.*

Madras Buildings (Lease and Rent) Control Act (XVIII of 1960), section 10 (3) (a) and (c)—Petition under section 10 (3) (a)—Landlord recovering possession during pendency of petition—If could seek additional accommodation—Scope of—Finding of fact—Interference in revision.

Transfer of Property Act (IV of 1882), section 106—Notice to quit—If necessary for proceedings under the Rent Control Act.

Where a landlord filed an application for eviction of a tenant from three shops (portions) on the ground that he *bona fide* required the same for his business and during the pendency of the said proceedings the landlord got possession of one of the shops, his case should normally fall under section 10(3) (*c*) of the Buildings (Lease and Rent) Control Act, 1960, as one for additional accommodation.

Where the Courts and tribunals below have found that the landlord required all the three shops for his requirement and that he cannot effectively make use of the shops for his business without obtaining possession of all the shops, it is a pure question of fact which does not call for interference in revision. It is no doubt true that the proviso to section 10 (3) (*c*) enjoins on the Court to taken into account the relative hardship likely to be caused to the tenant in cases where the landlord seeks additional accommodation. Even though the Courts below may not have specifically referred to this proviso, where on a reading of the order it is clear that the Courts had in mind this aspect of the case and were satisfied that the relative hardship was in favour of the landlord, the High Court will not interfere in revision especially when the point was not raised in the Courts below.

Quære :—Whether a notice to quit determining the tenancy according to the provisions of section 106 of the Transfer of Property Act is necessary before taking eviction proceedings under the Rent Control Act?

Petition under section 25 of the Rent Control Act and under section 115, Civil Procedure Code, praying the High Court to revise the order of the District Court of Kanyakumari at Nagercoil dated 28th November, 1964, and made in O.P. No. 53 of 1964 against the order of the Court of Subordinate Judge of Nagercoil in H. R.A. No. 4 of 1964 (H.R.C. No. 83 of 1963, District Munsif's Court, Nagercoil).

A. Subramanya Ayyar, for Petitioner.

S. Kothandarama Nayanar, for Respondent.

The Court delivered the following

JUDGMENT :—This revision petition arises out of the proceedings initiated under section 10 (3) (*c*) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) (hereinafter referred to as the Act), on the ground that the landlord required the shops in occupation of the tenant as additional accommodation for the business which the landlord was carrying on.

The landlord is the owner of the building which contains three shops and in the occupation of some tenants. The landlord is carrying on business in the sale and repair of watches, and he was a tenant under one Gomathi Ammal, opposite to the premises in question. This Gomathi Ammal appears to have filed a suit, obtained a decree for eviction of the landlord and therefore the landlord was obliged to vacate the premises. Hence, the landlord filed a petition, for obtaining possession of the shops in question.

From the record, it appears that, before the petition was disposed of by the Rent Controller, the landlord had obtained possession of one of the shops from the

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* C.R.P. No. 85 of 1965. 7th April, 1965

tenant thereof. Naturally, this was relied on by the tenant (petitioner here) as a strong circumstances to resist the application of the landlord, that the landlord having obtained possession of one shop could not claim that he required the other two shops for additional accommodation for his business.

The tenant was also sought to be evicted on the ground of arrears of rent, and, on that question, all the Courts have found against the landlord, and, therefore, no reference need be made to that portion of the case.

The Rent Controller, the appellate authority and the learned District Judge in revision have held that the business activities of the respondent were such that he undoubtedly required all the three shops for his requirements. It is sufficient to refer to paragraph 7 of the order of the learned District Judge, as it contains all the details and discussion of the relevant facts. In his judgment, the learned District Judge has adverted to the important fact that the building is an old one, that there are cracks in the walls of the shops requiring immediate attention and repair, and that the landlord cannot carry out the repairs, unless he obtained possession of all the three shops. This is a pure question of fact, and no ground whatsoever has been made out for interference under section 115, Civil Procedure Code, when all the authorities have found against the tenant on this portion of the case.

Mt. Subramania Iyer, learned Counsel for the petitioner, urged before me that this case is governed by proviso to section 10 (3) (*c*) of the Act, and that the tenant could be evicted only if, under the proviso, the authorities found that, on a consideration of the relative hardship and advantage, the hardship that would be suffered by the landlord would outweigh the inconvenience and hardship that the tenant might be put to. It is true that there is no specific reference to this proviso, but, on a reading of the order of the Rent Controller and District Judge, I am satisfied that the authorities below had undoubtedly in their mind the proviso to section 10 (3) (*c*) and it was only after being satisfied that the hardship that would be caused to the landlord would outweigh the hardship of the tenant, that the claim of the landlord for eviction was upheld. In this connection, I may mention that this point based on the proviso to section 10 (3) (*c*) was not raised in the Courts below.

In the course of the arguments, learned Counsel for the petitioner relying on a recent judgment of the Supreme Court in *Mangilal* v. *Sugan Chand*[1], contended that as no notice under section 106 of the Transfer of Property Act was given to him, the proceeding for eviction was misconceived and liable to be dismissed *in limine*. He also drew my attention to the order of Srinivasan, J., in W.P. No. 1124 of 1963, in which the learned Judge has expressed an opinion that this point which was also raised therein is an important point of law requiring consideration by a Full Bench of this Court. But, as this point was not raised in the Courts below nor even in the grounds of revision, I am not inclined to allow learned Counsel to raise the same at this belated stage. It is a matter for consideration whether the decision of the Supreme Court would apply to a proceeding under the Rent Control Act and not suit in ejectment and whether it would apply to a proceeding for eviction when it is not based upon default in the payment of arrears of rent but upon other grounds of eviction provided under the statute. The question as to how far the decision of the Supreme Court referred to earlier which turned upon the peculiar provisions of the Madhya Pradesh Rent Control Act would apply to a proceeding (not a suit) under the Rent Control Act requires careful investigation, in the light of the view taken by the Supreme Court in *R.M. Paranjype* v. *A.M. Mali*[2] and *Gange Dutt Murarka* v. *Kartik Chandra Das*[3]. It is unnecessary to refer to this aspect of the matter in detail, as I am not allowing learned Counsel to raise that point in this revision petition.

The revision petition is dismissed. There shall be no order as to costs. The tenant shall have time to vacate till 10th October, 1965. If the tenant does not vacate and hand over possession to the landlord within the time mentioned, the landlord will be entitled to vacate the tenant by taking execution proceedings.

R.M. ——— *Petition dismissed.*

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1. A.I.R. 1965 S.C. 101.
2. A.I.R. 1962 S.C. 753.
3. (1962) 2 S.C.J. 584: (1962) 2 M.L.J. (S.C.) 161 : (1962) 2 An.W.R. (S.C.) 161.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

John and others .. *Appellants.**

Suppression of Immoral Traffic in Women and Girls Act (*IV of* 1956), *sections* 3 (1) *and* 4 (1)—*Isolated instance of a woman having sexual intercourse with another in her house procured by her servant—No offence of running a brothel—Section* 4 (1)—*Living on the earnings of prostitution—Servant paid for procuring person for the act charged under section* 3 (1), *if can be punished under section* 4 (1).

The definition of 'brothel' under Suppression of Immoral Traffic Act implies that the premises must have been used for the purpose of prostitution for the gain of another person or for the mutual gain of two or more persons. The term will not apply where one woman receives a number of men. In the absence of evidence that two prostitutes worked for their mutual gain in the premises and in the absence of evidence that the prostitution of the accused was for the gain of her husband, there cannot be a conviction for the offence under section 3, or that the premises in question was used as a brothel. But the servant of the woman procuring a person for the purpose of prostitution for money, though charged under section 3 (1) of the Act can be convicted under section 4 (1) of the Act for living on the earnings of prostitution.

Appeal against the Judgment of The Second Presidency Magistrate of the Court of Presidency Magistrates, George Town, Madras in Case No. 12239 of the Calendar for 1963.

T.M. Kasturi and *Natarajan* for *Jan* and *San* for Accused 1 and 2.

K. Rangarajulu, for Accused No. 3.

K.A. Panchapakesan, for Public Prosecutor on behalf of the State.

The Court delivered the following

JUDGMENT—The learned Second Presidency Magistrate, George Town, Madras, convicted and sentenced three persons as follows :

Accused 1 to 3 were convicted under section 3 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, for the offence of keeping a brothel at a premises in C.P. Ramaswami Iyer Road, Mylapore, Madras. Each of them was sentenced to rigorous imprisonment for one year, accused 3 was further charged under section 3 (2) (*a*) of the Act for having allowed accused 1 and 2 to use the upstairs portion of the said premises as a brothel, convicted and sentenced to rigorous imprisonment for one year, to run concurrently with the sentence on the first charge. They have appealed against the convictions and sentences.

The facts of the prosecution case are briefly the following: Accused 2, Sayeed, is the wife of accused 3. Accused 1 is their servant, P.W. 1 who is a broker in the sale and purchase of sheep and goats, was stopped near the Wellington Talkies at about 9-30 A.M. on the day of occurrence (14-7-1963) by a stranger who apparently acted as a pimp. After persuading P.W. 1 that he could have sexual intercourse with an attractive girl, the aforesaid stranger took P.W. 1 in a taxi to the premises in C.P. Ramaswami Iyer Road, where accused 2 and 3 were living at that time. Accused 3 was absent. P.W. 1 met at the foot of the staircase of the house, the servant, accused 1, who was informed by the pimp about the purpose for which P.W. 1 had arrived there. Accused 1 demanded Rs. 150 but P.W. 1 was prepared to offer only Rs. 100. While some bargaining was going on in this manner accused 2 appeared and said that it would suffice if Rs. 100 was given as offered by P.W. 1. Then accused 1 received Rs. 100 from P.W. 1 and handed it over to accused 2 who paid Rs. 20 to the pimp for his trouble and then she and P.W. 1 climbed the staircase and had intercourse on a veranda in the upstair room. Accused 2 kept the sum of Rs. 80 given by P.W. 1 folded under her pillow at that time. Just at this juncture P.W. 5, the Assistant Commissioner of Police, Vigilance, along with other Policemen and P.W. 2, arrived at the scene and surprised the couple while they were arranging their dresses. On the arrival of the Police, accused 1, the servant, called out accused 2 from downstairs by her name. On the demand of P.W. 5, accused 2 produced Rs. 80 given by P.W. 1.

* Crl.A. No. 893 of 1963. 19th April, 1965

How the Police arrived at the scene is explained by P.W. 2 and P.W. 5. P.W. 5 stated that at about 10.30 A.M. on 14th July, 1963, when he was near Eldams Road with a party of Policemen he got information about the visit of a stranger to the premises in question in C.P. Ramaswami Iyer Road half an hour previously for the purpose of sexual intercourse with a girl there and on this information he proceeded to make a raid and secured the help of P.W. 2 who was going in that locality at that time. P.W. 2 is an employee of Messrs. Indian Oxygen Limited, Tondiarpet. P.W. 5 made a record of his information in Exhibit P-3 before making a search of the premises. He also stated that he approached a lady in the neighbourhood to assist him in the search and she declined. This reference to a lady for assisting at the search is made apparently in view of section 15 of the Act which enjoins the necessity of a woman witness in cases where the Police have to search a premises without a warrant on suspicion that an offence under the Act had been committed therein with reference to a woman or girl. There was also the evidence given by P.W. 4 who claims to be the brother of accused 2 that accused 2 was married to accused 3 some time previously and that the couple had moved from place to place. Accused 2 had complained to P.W. 4 that accused 3 was compelling her to sell her body for promiscuous intercourse and he was making a living in that way. P.W. 4 had also deposed that he and his other relations had actually been in the premises where accused 2 and 3 was living and had seen this unauthorised activity going on. A suggestion was made in the cross-examination of P.W. 4 that he had asked accused 2 for some money previously and that she had refused it and that on this account he was inimical towards accused 2.

Accused made a flat denial of the entire occurrence. Accused 3 stated that on the date of occurrence he was at Bangalore, that he was an income-tax assessee and he has got some business of his own insurance and other activities and that he was not keeping a brothel. Accused 1 claimed to be only a servant. The accused examined a Sub-Inspector of Police as D.W. 2 but his evidence has nothing to do with the present incident. There was also another formal witness, D.W. 1, who was summoned to produce some records but that witness's evidence also has got nothing to do with the present occurrence.

So far as the offence about the premises being used for the purpose of a brothel by accused 1 to 3 is concerned, if we leave aside the evidence of P.W. 4 for a minute, there is only the evidence that on 14th July, 1963, a woman living in the premises in question, namely, accused 2, had committed an act of prostitution with a stranger for money with the assistance of her servant, accused 1. For the inference that accused 3 was living on the earnings of his wife by hiring her body for promiscuous intercourse, the prosecution has to rely on the evidence of P.W. 4. P.W. 4's evidence on this point cannot be considered very satisfactory. His version is that in spite of his being aware of the reprehensible conduct of accused 3 in making his wife to prostitute herself against her will, he and his relations persisted in their visits to the house of accused 2 and 3 and that at times the objectionable activities of of accused 2 and 3 were conducted almost under their nose. This version appears to us to be too artificial and unnatural to be accepted. Reference was made in the course of his evidence to certain prior complaints by his father to the Police regarding the prostitution of accused 2 with the connivance of her husband for making a living thereby. But no copies of these complaints have been produced. It is possible that P.W. 4 suspected that something was wrong with his sister and her husband but the circumstances under which he claims to have seen them, appear to be too fancilful to be believed. If P.W. 4's evidence cannot be accepted, there are no proper grounds for holding that the premises in question were used by the three accused persons for running a brothel. The definition of 'brothel' implies that the premises must have been used for the purpose of prostitution for the gain of another person or for the mutual gain of two or more persons. There is also no evidence here of two prostitutes having worked for their mutual gain in these premises.

1. (1956) 1 Q.B. 67.

Unless there is satisfactory evidence that accused 2's prostitution was for the gain of accused 3, her husband, there cannot be a finding that the premises in question was used as a brothel.

Therefore, the convictions of accused 3 cannot be sustained on the basis of the evidence now on record. He is found not guilty and acquitted.

So far as accused 2 is concerned, again, leaving the evidence of P.W. 4, out of account as being interested and artificial, the rest of the evidence only leads to the inference that she committed an act of prostitution by giving her body for hire to P.W. 1 who had been brought to the premises by a pimp. She received Rs. 100 from P.W. 1 and the pimp got Rs. 20 out of it for his services. As one Enligh decision tersely puts it, the term ' keeping a brothel ' will not apply where one woman receives a number of men: vide *Strath* v. *Foxon*[1]. The definition of a ' brothel ' in the Indian Act does not make any departure from this test. Therefore, accused 2 cannot be convicted of the offence under section 3 (1) of the Act. Her conviction is also set aside.

So far as accused 1 is concerned, there is ample evidence to show that, though he is the servant of accused 2 he, actively abetted the act of prostitution by accused 2. Under section 4 (1) of the Act :

"Any person over the age of eighteen years who knowlingly lives, wholly or in part, on the earnings of the prostitution of a woman or girl shall be punishable ".

Under section 4 (2) if a person is proved to have exercised influence over the movement of a prostitute in such a manner as to show that such person is aiding, abetting or compelling her prostitution, he shall be presumed to be living on the earnings of prostitution. Here, accused 1 on the arrival of P.W. 1 negotiated the terms for the prostitution of accused 2. He received money from P.W. 1 and gave it to accused 2. Though he has been charged only under section 3 (1) of the Act, he can be convicted on the proved facts under section 4 (1) in this case which is a lesser offence. Two unreported judgments of this Court in C.A. Nos. 663 of 1960 and 667 of 1962 have laid down a similar view that even if the charge be under section 3 (1) of the Act, a conviction can be had on the same facts for an offence under section 4 (1) of the Act. Therefore, accused 1 is found guilty under section 4 (1) of the Act and he is convicted thereunder. He appears to be a first offender. He is a paid servant of accused 2 and he seems to have been wholly under the influence of his employer, accused 2 in the case. These are circumstances which justify resort to an order under section 10 of the Act in his case. I therefore direct that accused 1 be released on probation of good conduct on executing a bond in a sum of Rs. 300 with two sureties each in a like sum to appear and receive sentence when called upon during a period of one year from today and in the meantime be of good behaviour and keep the peace.

V.S. ——— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction).

PRESENT :—MR. JUSTICE VEERASWAMI.

Jana Devi .. *Petitioner**

v.

State of Madras represented by the Deputy Commissioner of Police, Traffic & Licencing, Vepery, Madras .. *Respondent.*

Motor Vehicles Act (IV of 1938), Madras Motor Vehicles Rules, 85—Motor Vehicles—Hire purchase agreement—Default—Possession of vehicle taken back—Application to the Deputy Commissioner for the issue of duplicate certificate of registration—Jurisdiction of Deputy Commissioner—Writ of mandamus.

It is the duty of the Deputy Commissioner to satisfy himself as to whether the petitioner had taken possession of the vehicle owing to the default of the owner under the provisions of the hire purchase agreement and the owner had refused to deliver the certificate of registration. He cannot put aside the matter merely observing that it is civil dispute. He must apply his mind and in so doing he may come to any conclusion, namely, whether he is satisfied or not, on the materials placed before him.

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1. L.R. (1956) 1 Q. B. 67.

* W.P. No. 1567 of 1964. 19th April, 1965.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the respondent to grant the duplicate certificate of registration and certificate of fitness for the vehicle MSZ 9127 to enable the petitioner to work out his rights under the hire-purchase agreement.

K. Hariharan, for Petitioner.

K. Venkataswami for Additional Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—The petitioner claims to be a financier advancing moneys under hire-purchase agreements on motor vehicles. One Lakshmi Ammal having purchased a car MSZ 9127 under a hire-purchase agreement defaulted in the payment of monthly instalments. As a result, the petitioner issued a notice through her Counsel on 11th September, 1963, for payment of the arrears on pain of her retaking possession of the vehicles under the terms of the agreement. As Lakshmi Ammal had failed to comply with the demand, the petitioner exercised her right of seizure on 13th March, 1964, under the agreement dated 26th November, 1962, through her authorised agent and took possession of the vehicle. Since Lakshmi Ammal purposely withheld the '*C*' certificate from her till 15th April, 1964, the petitioner applied on 15th April, 1964, to the Deputy Commissioner of Police, Traffic and Licensing, for the issue of a '*C*' certificate in her favour. On 8th May, 1964, the Deputy Commissioner replied stating that as a result of an enquiry he found that Lakshmi Ammal was questioning the legality and propriety of the seizure and that therefore the matter should be settled in a Court of law. The Deputy Commissioner therefore told the petitioner to obtain an order of Court to the effect that she was the owner so that he could issue a duplicate registration certificate. Aggrieved by this reply the petitioner has moved this Court under Article 226 of the Constitution asking for a writ of *mandamus* directing the Deputy Commissioner to grant a duplicate certificate for registration of the car. The petitioner adds that in view of the fact that he is not in possession of the '*C*' certificate, he has been disabled from using the car which is garaged and kept idle.

The Deputy Commissioner has in his counter-affidavit urged that he never failed to exercise his jurisdiction and that his reply above referred to was not a final order and that therefore this petition is premature.

The jurisdiction of the Deputy Commissioner of Police, Traffic and Licensing, to cancel the '*C*' certificate and issue a duplicate for default of the owner to pay hire-purchase instalments is under rule 85 of the Madras Motor Vehicles Rules. It says that if the party, other than the owner, to an agreement of hire-purchase, satisfies the registering authority that he has taken possession of the vehicle owing to default of the owner under the hire-purchase agreement and the owner has abandoned or declined to deliver the certificate of registration, the registering authority may, after giving the owner an opportunity of being heard, cancel the certificate of registration and issue a duplicate one. It is clear from this rule that it is the duty of the Deputy Commissioner to satisfy himself as to whether the petitioner had taken possession of the vehicles owing to default of the owner under the provisions of the hire-purchase agreement and the owner had refused to deliver the certificate of registration. He cannot put aside the matter merely observing that it is a civil dispute. He must apply his mind and in so doing he may come to any conclusion, namely, whether he is satisfied or not satisfied on the materials placed before him. It is another matter if a Court of law agrees with his conclusion or not in a properly instituted proceeding. But as the Deputy Commissioner does not state in his counter that he has passed any final order, I do not think it necessary to issue any rule.

The petition is dismissed and it is expected that the Deputy Commissioner will expeditiously dispose of the petitioner's application in accordance with rule 85 of the Madras Motor Vehicles Rules and the observations contained in this judgment.

No costs.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

N. Naganatha Iyer, Tiruchirapalli .. *Applicant**

v.

The Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (*XI of* 1922), *section* 34—*Income escaping assessment—No action taken on the voluntary returns filed by the assessee—Initiation of reassessment proceedings—No jurisdiction—Appeal against orders of reassessment on the basis of "omission" or "failure"—Appellate Authority setting aside assessment—Direction to Officer to proceed on the basis of "information" as to escapement—Not legal.*

Pending determination of the question in reference proceedings whether the share income received by the assessee, a member of the Hindu Undivided Family, was includible in the income of the Hindu Undivided Family in its assessment, the assessee-member was submitting his own returns disclosing such share income as his own individual income. No action was taken on the returns made by the assessee. But reassessment proceedings were initiated against the assessee on the ground of his omission or failure and the assessment completed as such. In appeal the Appellate Authority set aside the assessment order and directed the Officer to proceed to reassess on the basis of "information" obtained by the Officer. On appeal the Tribunal held that the appeals had become otiose as the Appellate Authority had vacated the assessments appealed against. The Income-tax Officer in accordance with the order of the Appellate Authority made a fresh assessment, and the same was confirmed by the Department and the Tribunal. On a Reference, under section 66 (2) of the Income-tax Act.

Held, the proceedings for reassessment are vitiated by lack of jurisdiction.

Where an assessee files a voluntary return, but no assessment is made thereon, it cannot be said that the income had escaped assessment on account of any omission or failure on the part of the assessees so as to confer jurisdiction on the Officer to initiate reassessment proceedings under section 34 (1) (*a*) of the Act.

In setting aside the order of reassessment made in pursuance of section 34 (1) (*a*) of the Act, the order of the Appellate Authority directing the Officer to reassess on the basis of "information" under section 34 (1) (*b*) of the Act is not legal.

Reference under section 66 (2) of the Indian Income-tax Act, 1922.

S. Swaminathan and *K. Ramagopal*, for Applicant,

V. Balasubrahmanyam, Standing Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Venkatadri, J.—The Tribunal has submitted a Statement of the Case, directed under section 66 (2) of the Indian Income-tax Act, and the statement discloses the following facts :—

The assessee, Naganatha Iyer, is a member of a Hindu Undivided Family consisting of himself, his father, Narayanswami Iyer, and his brother, Ganapathi Iyer. The family was carrying on business in rice-mill, firewood, oil-cake and soap nut powder at Tiruchirappalli. In February, 1941, the assessee entered into a partnership with one Manickam and carried on business under the name and style of "Andhra Trading Company". The firm traded in firewood and oil-cake and also plied lorries for hire. The business of the firm was also carried on at Tiruchirapalli. For the assessment year 1942-43, which was the very first year of assessment for the firm, the share income from the said firm was returned by the assessee as his separate income. The Hindu Undivided Family, of which the assessee is a member, also filed its return. The assessee claimed that he was carrying on the partnership business in the Andhra Trading Company in his individual capacity and the firm had nothing to do with the Hindu Undivided Family. His father, Narayanaswami Iyer, also wrote a letter to the Income-tax Officer stating that he had no claim to the income from the Andhra Trading Company, as it belonged exclusively to his son, the assessee. The Income-tax Officer, after making enquiries, satisfied himself that the share income from the Firm represented the individual income of the assessee, and accordingly separately assessed it in the hands of the assessee for the assessment years 1942-43, 1943-44 and 1944-45. But, in the assessment for the year 1945-46, the Income-tax Officer came to the conclusion, on the basis of the conduct of the parties and the

* Tax. Case No. 162 of 1962. 2nd February, 1965.

entries in the account books of the family business and those of the Andhra Trading Company, that the assessee was a partner in the firm on behalf of himself and the other members of the family, and therefore his share income from the firm was included in the return of the undivided family. Narayanaswami Iyer, the father of the assessee, and the Karta of the Hindu Undivided Family filed an appeal, against such inclusion of his son's individual income in the return of the Hindu Undivided Family. The Appellate Assistant Commissioner did not accept the contention of the father, and on dismissal of his appeal, he filed a further appeal to the Tribunal, where also he was unsuccessful. Finally the family moved this Court under section 66 (2) of the Act and the High Court directed the Tribunal to state the case on the question of inclusion of the share income of the assessee in the income of the family, consisting of the assessee, his father and his brother. The High Court finally answered the reference, in favour of the Hindu Undivided Family: *Narayanaswamy Iyer* v. *Commissioner of Income-tax*[1]. This decision was rendered on 12th December, 1955.

During the pendency of that Reference in this Court, the assessee, as usual, submitted his return in respect of his share income in the said firm for the assessment years 1948-49 and 1949-50. The Income-tax Officer ignored these returns and did not take any steps to assess the assessee on the basis of these returns.

The Income-tax Officer issued a notice on 17th March, 1953, under section 34 (1) (*a*) of the Act, requiring the assessee to file his return for the assessment year 1948-49. The assessee submitted that the return for 1948-49 was already filed before the Income-tax Officer on 8th March, 1949, and that it was not lawful to ignore the return and resort to the provisions of section 34 (1) (*a*) of the Act. However, the assessee filed a copy of the return under protest. The assessment was completed on 13th March, 1954. Again for the assessment year 1949-50, the Income-tax Officer issued a notice under section 34 of the Act on 16th March, 1954, and the assessee filed a return under protest though he had filed one in the ordinary course on 25th April, 1950. The Officer completed the assessment on 7th May, 1954. In both the cases, the Officer made the assessment on the assessee by adopting the income from the firm as his individual income. It may be noted that the same items of income had been assessed on the Hindu Undivided Family, rejecting the assessee's claim that the income was not that of the Hindu Undivided Family.

The assessee preferred appeals to the Appellate Assistant Commissioner and contended that he had already filed the returns, that the Income-tax Officer was not justified in ignoring them and invoking the provisions of section 34 (1) (*a*) of the Act and that the assessment made on 13th March, 1954 and 7th May, 1954, were barred by limitation, as four years had expired from the end of the relevant year of assessment. The Appellate Assistant Commissioner upheld the action of the Income-tax Officer under section 34. He was of the view, however, that the case came under the provisions of section 34 (1) (*b*). Finally, he set aside the orders of the Income-tax Officer, to enable him to rework the income of the assessee according to law.

There were further appeals to the Tribunal, objecting to the validity of the assessments under section 34 (1) (*a*) of the Act. The Tribunal held that the appeals had become otiose, as the Appellate Assistant Commissioner had vacated the assessments appealed against.

Thereafter, the Income-tax Officer, in accordance with the order of the Appellate Assistant Commissioner, made fresh assessment for the two years, *viz.*, 1948-49 and 1949-50 on 22nd January, 1957. Aggrieved with the assessment made, the assessee preferred appeals to the Appellate Assistant Commissioner, once again contending that the whole proceedings initiated under section 34 (1) (*a*) were illegal and void, inasmuch as the returns of his individual income had been submitted already and that no action was taken thereon. He further contended that when once the Appellate Assistant Commissioner came to the conclusion that section 34 (1) (*a*)

1. (1956) 29 I.T.R. 515 : I.L.R. 1956 Mad. 222 : A.I.R. 1956 Mad. 398.

was not applicable, he should not have given directions to rework the assessment under section 34 (1) (*b*), and that, in any event, there being no assessment under section 34 (1) (*b*) within four years from the end of the year of assessment, the Appellate Assistant Commissioner could not in law enlarge the period of limitation prescribed by the statute by purporting to act under the proviso to section 34 (3). The Appellate Assistant Commissioner, with regard to the assessment for the year 1948-49, referred to the earlier decision of his predecessor and held that the point could not be considered in that appeal. However, in regard to the quantum, the Appellate Assistant Commissioner gave some relief. The appeal for 1949-50 was dismissed as withdrawn.

The assessee preferred further appeals to the Income-tax Appellate Tribunal and contended that the assessments made under section 34 were time-barred and illegal, that the assessee having himself filed the returns, there was no question of notice either under section 22 (2) or section 34 and that section 34 (1) could be invoked only when there had been escapement of income and consequent failure on the part of the assessee. The Tribunal rejected all these contentions of the assessee and confirmed the order of the Appellate Assistant Commissioner.

Now, on the request of the assessee, who failed before the Tribunal to refer the case to this Court, this Court directed the Tribunal to state a case, on the question whether the assessment under section 34 of the Act was lawful. The Reference, therefore, involves the true construction of section 34 of the Income-tax Act. Lord Normand, while considering the scope of section 34, delivered his opinion thus in *Commissioner of Income-tax, Bengal* v. *Mahliram Ramjidas*[1] :

> "The section although it is part of a taxing Act, imposes no charge on the subject, and deals merely with the machinery of assessment. In interpreting provisions of this kind the rule is that that construction should be preferred which makes the machinery workable, *ut res valeat potius quam pereat.*"

Therefore this section gives power to the Income-tax Officer to take proceedings, when the assessee did not disclose fully the total income in his return or did not reveal the sources of income or did not submit a voluntary return of income under section 22 (1) or when income, profits or gains chargeable to tax is omitted or has been under-charged, and he has reason to believe in consequence of information that the income has escaped assessment or full assessment. Section 34 is intended to vest in the Income-tax Officer a power to amend the assessment, when he has reason to believe that any income, profits or gains chargeable to income-tax have escaped assessment for any year, and, in such a case, he may proceed to assess or re-assess such income, profits or gains or re-compute the loss or depreciation allowances. Before he exercises his power, he should have some material to form his opinion that the assessee suppressed the relevant facts to escape assessment, or that he himself inadvertently omitted to consider a fact or point of law. The burden of proof is on the Department to show that the income has escaped assessment, and it is not for the assessee to prove the contrary. In a proceeding under section 34, the Income-tax Officer is only dealing with the extra income, which has not been assessed to income-tax. He has no jurisdiction to make a new assessment.

Section 34 deals with two cases of escaped assessment; clause (*a*) of section 34 (1) deals with a case where there is an omission or failure on the part of the assessee to make a return, and clause (*b*) deals with a case where, even without there being an omission or failure on the part of the assessee, the Income-tax Officer receives certain information with regard to income having escaped assessment. Thus, two conditions are necessary before proceedings can be taken under this provision. In this case, the assessee had submitted a return, but the Department ignored his return and did not take steps to assess his income. It cannot be said that the Officer had reason to believe that the income escaped assessment in the relevant assessment year.

What is meant by "escaped assessment" was explained in *Sir Rajendranath* v. *Commissioner of Income-tax*[2]. In that case, when one Burn & Co. filed a return

1. (1940) 2 M.L.J. 577 : I.L.R. (1940) 2 Cal. 215 : L.R. 67 I.A. 309.
2. (1934) 66 M.L.J. 121 : L.R. 61 I.A. 10 : I.L.R. 61 Cal. 285.

to the Income-tax Authorities, they made an assessment including it in the income of Martin & Co. Subsequently, Martin & Co. disputed the action of the Income-tax Authorities in legal proceedings. The High Court directed the Tax Authorities to eliminate the income of Burn & Co. in the assessment of Martin & Co. When the Taxing Authorities began to take action on the individual income of Burn & Co. they objected that the Authorities should have taken proceedings under section 34. Lord Macmillan, who delivered the opinion observed :

> "To say that the income of Burn & Company which ....was returned for assessment and which was accepted as correctly returned, though it was erroneously included in the assessment of Martin & Company, has 'escaped' assessment ...... seems to their Lordships an inadmissible reading. The fact that section 34 requires a notice to be served calling for a return of income which has escaped assessment strongly suggests that the income which has already been duly returned for assessment cannot be said to have 'escaped' assessment within the statutory meaning."

In the instant case, it is common case that the assessee made a return for the assessment years in question. But the Department was hesitant to assess him individually, as it was of opinion that this income should have been included in the return made by the joint family, of which he was a member. In *Mannalal Modi* v. *Commissioner of Income-tax, Bihar and Orissa*[1], when the assessee filed a return of his income, as an individual, it was transferred to the Officer who was dealing with the return of the family income of the assessee. Subsequently, it was found that there was a partition in the family. The Income-tax Officer issued a fresh notice under section 34 calling upon him to file the return. He objected that he had already submitted his return. The question for consideration was whether the assessment under section 34 was valid. The learned Judges observed at page 41:

> "..........the assessment proceedings had not come to an end. The return was still pending. Whether it was pending before the territorial Income-tax Officer or the Income-tax Officer, Special Circle, is immaterial as far as the assessee is concerned. He had filed a return and an assessment could have been made by the Department under section 23 in pursuance of that return. Under these circumstances, it cannot be said that the income chargeable to income-tax had escaped assessment, and, therefore, the Income-tax Officer had no jurisdiction to issue a notice under section 34 of the Act."

The same principle has been followed in *Muthiah Thevar* v. *Commissioner of Income-tax, Madras*[2]. There the assessee submitted a return for the assessment year 1944-45, in response to a notice under section 34 of the Act. He also submitted a return for the assessment year 1945-46. The Income-tax Officer took no action on the return of 1945-46. Later, the Officer issued a notice of re-assessment under section 34. The assessee objected and stated that he had already submitted his return for the year 1945-46. Admittedly, the Officer had not made any assessment for that year. It was held that the Income-tax Officer was not entitled to initiate proceedings under section 34 of the Act. Reliance was placed on *Commissioner of Income-tax* v. *Ranchhoddas Karsondas*[3]. The facts of that case are these. The assessee made a return in 1950 that his assessable income for the assessment year 1945-46 was only Rs. 1,935 with a foot-note that his wife had sold her old ornaments and deposited the sum of Rs. 59,026 in the firm in which he was a partner. The Department ignored this return and did not act on that. The Department issued a notice purporting to be under section 34 of the Act calling upon the assessee to submit his return. The assessee submitted a similar return showing the same income and adding the same foot-note. The Income-tax Officer included the sum of Rs. 59,026 in the total income of the assessee and assessed him on it for the assessment year 1945-46. The assessee disputed the assessment, and finally, when the matter went to the Supreme Court, their Lordships agreed with the High Court of Bombay that notice under section 34 was necessary only if, at the end of the assessment year, no return had been made by the assessee and the Authorities wished to proceed under section 22 (2), but, where the assessee himself chose voluntarily to make a return, no question could arise under section 34 of assessment escaping and therefore

1. (1956) 29 I.T.R. 30 : A.I.R. 1956 Orissa 37.
2. (1960) 39 I.T.R. 107 : A.I.R. 1960 Mad. 398.
3. (1960) 1 S.C.R. 114 : A.I.R. 1959 S.C. 1154.

there was no necessity to serve any notice under section 34. Their Lordships further observed :

"There was nothing to prevent the Income-tax Officer from taking up the return and proceeding to assess the income of the assessee. It was open to him, if there was sufficient justification for it, to hold that the amount noted in the foot-note was really the assessee's income, in which case an assessable income would have been found and the tax could be charged thereon. If the Income-tax Officer had acted on that return and assessed the assessee before 31st March, 1950, the assessment would have been valid. He chose to ignore the return, and served on the assessee a notice under section 34 (1). This notice was improper, because with the return already filed, there was neither an omission nor a failure on the part of the assessee, nor was there any question of assessment 'escaping'. The notice under section 34 (1) was therefore, invalid and the consequent assessment, equally so."

Therefore, when a return has been filed but no assessment has been made, it cannot be said that the income escaped assessment, so as to confer a jurisdiction on the Income-tax Officer to invoke the aid of section 34. Once we come to the conclusion that the whole proceeding initiated by the Income-tax Officer under section 34 is void of jurisdiction, the assessment certainly cannot be maintained in law. The assessment cannot also be said to be in accordance with law or binding on the assessee.

It was further contended by learned Counsel for the assessee that, when the Appellate Assistant Commissioner directed the Income-tax Officer to take proceedings under section 34 (1) (*b*) while setting aside the orders passed by the Income-tax Officer in pursuance of the notice issued under section 34, the direction itself was illegal and irregular. To support his proposition, he drew our attention to the decision in *Commissioner of Income-tax* v. *N. Veeraswami Chettiar*[1], to which one of us was a party. In that case, the Income-tax Officer passed orders on the assessee who was a shareholder in a company that he became assessable to tax on the basis of the deemed distribution of dividends, before any order was made on the company under section 23-A. On appeal by the assessee, the order was set aside on the ground that there was no information upon which any escape of income could be founded. Subsequently, when final orders were passed on the company, the Officer made a further order of assessment on the assessee under section 34 but without notice. Again, when the assessee filed an appeal, the Appellate Assistant Commissioner cancelled the re-assessment and, while passing the order, stated that the Officer could proceed under section 34 to include the dividends in the hands of the shareholder. The assessee again objected, and finally, when the matter came to this Court, it was held

"But in a proceeding for reopening an assessment and making a re-assessment under section 34, the Income-tax Officer acquires jurisdiction in a particular manner and it is open to the Appellate Authority to make a direction which would have the effect of conferring jurisdiction in a case where such jurisdiction has not been properly acquired by the Income-tax Officer. From the words of the section itself, it is seen that no authority other than the Income-tax Officer has jurisdiction under section 34 of the Act. If the present case had been one where the initiation of the proceedings had been validly launched, it would be open to the Appellate Assistant Commissioner in appeal before him, while setting aside the assessment, to issue directions. But it is unthinkable that a direction can be made in the exercise of the powers under section 31 of the Act which goes to the extent of conferring jurisdiction upon the Income-tax Officer if he is not lawfully seized of jurisdiction. To our minds, the direction issued by the Appellate Assistant Commissioner travels far beyond the scope of section 31 of the Act in the circumstances of the case. If the direction is neither lawful nor valid, it cannot come within the scope of the saving proviso and serve to remove the bar of limitation."

Relying on the principle, we are of opinion that the direction given by the Appellate Assistant Commissioner while setting aside the order of assessment, that the Income-tax Officer should invoke the provisions of section 34 (1) (*b*), and the action of the Income-tax Officer in re-assessing the income is neither lawful nor valid. The proceeding under section 34 initiated by the Income-tax Officer even in the first instance is wholly void, irregular and illegal.

It was next contended by learned Counsel for the Department that, once the assessee himself withdrew the appeal for the year 1949-50, before the Appellate

1. (1963) 1 I.T.J. 311 : (1963) 1 M.L.J. 310.

Assistant Commissioner, he could not raise the objection either before the Tribunal or before us that the proceedings initiated by the Department for re-assessment under section 34 was invalid. But on a close scrutiny of the record, we find that the assessee by his letter dated 8th July, 1957 to the Appellate Assistant Commissioner has only withdrawn the objection in regard to the estimated income for the year 1949-50. We are also of opinion that the Tribunal committed an error in coming to the conclusion that the assessee did not raise the contention in the grounds of appeal that he never gave up the legality of the assessment for the year 1949-50. Here again, we have seen the copy of the enclosure to the grounds of appeal before the Tribunal, wherein he has stated specifically that he was withdrawing only the objection regarding the estimated income. There was no request to withdraw the appeal in relation to the legality of the assessment. It is hardly likely that it would have been withdrawn for the assessee had succeeded in establishing that this income was not includible in the income of the Hindu Undivided Family in the Reference to this Court relating to 1945-46. Therefore, we feel that the assessee is entitled to claim before us that the action of the Income-tax Officer in re-assessing his income for 1949-50 under section 34 of the Act is invalid.

For the reasons stated above, we answer the question in the negative and hold that, on the facts and circumstances of the case, the assessment under section 34 of the Act is not lawful.

V.S. ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Chinnakolandai Goundan .. *Appellant**

v.

Thanji Gounder and others .. *Respondents.*

Hindu Succession Act (*XXX of* 1956), *section* 14—*Construction and scope—Widow in possession of husband's estate—Alienation by way of gift prior to Act—Suit by reversioner after Act to declare gift invalid and not binding on reversioner after death of widow—Reconveyance by donee under gift deed to widow pending suit—Effect—Right of reversioner to continue suit after reconveyance—Principles of Hindu Law as to reversionary rights and effect of Hindu Succession Act.*

A Hindu widow or other limited owner is not a tenant for life, but is the owner of the property inherited by her as an heir, subject to certain restrictions on alienation and subject to its devolving upon the nearest heir of the last male owner upon her death. So long as she is alive no one has any vested interest in the succession.

The overriding effect of the Hindu Succession Act as declared in section 4 thereof is not all embracing, but the rules of Hindu Law shall cease to have effect only as regards matters for which provision has been made in the Act. On matters for which there is no specific provision in the Act, the principles of Hindu Law would still continue to apply.

A widow who has made an alienation, even if it comprises the entirety of the estate is not civilly dead but continues to represent the estate. The title of the alienee, where the alienation is not for necessity, is undoubtedly defeasible, the defeasance arising out of the incidents of Hindu Law. The transferee gets only the widow's estate, which is not an indefeasible life-estate, and it can come to an end not merely on her death but on the happening of other contingencies like remarriage, adoption, surrender, etc. Subject to any question of fraud or collusion that might arise, there is no conceivable reasons why the reversioner in the case of a surrender should not be in a position to recover possession of the property alienated from the alienee from the widow or from one who has obtained title by adverse possession against her, as none of them could acquire rights except against the widow.

If an alienation is made by the widow, and if the same is questioned by a reversioner either in a suit or otherwise thereby causing a cloud on the title of the alienee, there is nothing in Hindu Law or under the general principles of the law of transfer, which would prevent the alienee conveying back the property to the alienor (widow) in the same capacity and in the same right in which it was conveyed by the widow ; and on such reconveyance, the property in her hands would be subject to all the incidents of Hindu Law, as the property inherited by the widow from her husband.

Section 14 of the Hindu Succession Act, while it enlarges the limited estate of a female subject to the conditions in section 14 (1) and (2) does not otherwise abrogate or render inapplicable other rules or principles of Hindu Law.

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* S.A. No. 2003 of 1961. 30th October, 1964.

Section 14 would apply to any property acquired by a widow before or after the commencement of the Act. Where the alienee to whom the property was transferred before the Act reconveys the property to the widow after the Act, section 14 (1) would undoubtedly come into play and the widow would get absolute rights.

The 3rd defendant who was in possession of the property of her deceased husband conveyed it to the 2nd defendant who was the son of a brother of her husband under a registered deed of gift on 1st June, 1948. On 2nd September, 1958, the plaintiff who was another brother of her husband filed a suit as her husband's nearest reversioner for declaration that the gift deed would not be binding on the reversion after the widow's death. Pending the suit the 2nd defendant the donee under the gift deed conveyed back the property to the widow under a deed, dated 12th November, 1958. The widow claimed that by reason of the re-conveyance and section 14 (1) of the Hindu Succession Act she became the absolute owner of the property and that therefore the plaintiff was not entitled to continue the suit as a reversioner of her husband.

Held, that by reason of the re-conveyance that suit of the reversioner (plaintiff) became useless and cannot be prosecuted any further, as the widow became the absolute owner of the property.

Appeal against the Decree of the Court of the Subordinate Judge of Vellore, dated 12th July, 1961, in Appeal Suit No. 414 of 1960, preferred against the Decree of the Court of the District Munsif of Vellore, in Original Suit No. 473 of 1958.

V. V. Raghavan and *T. V. Sivagnanam*, for Appellant.

N. R. Raghavachari and *Srimathi Jayalakshmi* and *Srikumar*, for Respondent.

The Court delivered the following

JUDGMENT.—This Second Appeal raises an interesting question of law about the applicability of section 14 of the Hindu Succession Act (Central Act XXX of 1956), hereinafter referred to as the Act. The brief facts of the case are :

The properties involved in the suit belonged to one Govindaraju Goundan, who died about thirty years ago. The plaintiff and the first defendant are his brothers while the third defendant is his widow. The second defendant is the son of the first defendant, and he has married the third defendant's brother's daughter. The third defendant who was in possession of her husband's properties conveyed the same to the second defendant under a registered deed of gift, Exhibit B-1, dated 1st June, 1948. On 2nd September, 1958 the plaintiff, as the nearest reversioner of Govindaraju Goundan, filed the suit for a declaration that the gift deed in favour of the second defendant would not be binding on the reversion after the death of the widow. Two months later, while the suit was pending, the second defendant, the settlee under Exhibit B-1, conveyed back the properties to the widow under Exhibit B-2, dated 12th November, 1958. On behalf of the widow, the third defendant, the objection was raised that by reason of this reconveyance under Exhibit B-2, and section 14 (1) of the Hindu Succession Act, she had become the absolute owner of the properties, and that the plaintiff is not entitled to continue the suit as a reversioner of Govindaraju Goundan. In other words, the plea of the third defendant was that as a result of the reconveyance the properties became hers and the plaintiff cannot make any claim thereto, whether immediate or contingent, as a reversioner of Govindaraju.

The trial Court held that the material date was the date when the suit was filed, and that the widow was not in possession of the properties of her husband, that the plaintiff, the reversioner was entitled to the declaration, and that the reconveyance during the pendency of the suit would not in any way affect the right of the reversioner to obtain a declaration that the alienation would not bind the reversionary interest after the lifetime of the widow. But on appeal the learned Subordinate Judge came to a contrary conclusion and allowed the appeal, holding that the plaintiff was not entitled to continue the suit and no declaration can be made in his favour. The plaintiff has preferred this Second Appeal.

Though some argument was advanced in the Courts below that the widow herself was in possession of the property despite the settlement, Exhibit B-1, learned Counsel on both sides accepted the position that from 1948, the date of the settlement, till the reconveyance the widow had no possession of the properties, and that it was with the settlee, the second defendant.

Learned Counsel for the appellant placed considerable reliance upon the Bench decision of this Court in *Marudakkal* v. *Arumugha Goundar*[1], and the other decisions in which the view was taken that where prior to the commencement of the Hindu Succession Act the limited owner in possession of her husband's estate had alienated the properties without necessity and for purposes not binding upon the estate, and if the alienee was in possession of the properties on the date when the Act came into force, the reversioner to the estate would be entitled to obtain a declaration that the alienation will not bind the reversioner and that section 14 of the Act had not the effect of converting the alienee's title to the alienated properties, into an absolute and indefeasible one. Applying the ratio of this decision learned Counsel for the appellant contended that the material date for determining the plaintiff's right to obtain a declaration was the date of the suit, and that if on that date he was entitled to obtain such a declaration, section 14 had no application, because the widow was not in possession of the properties, and that right which inhered in the plaintiff on the date of the suit cannot be affected or destroyed by any alienation *pendente lite* though between the defendants *inter se*. He urged that either under the doctrine of *lis pendens* or on general principles, the right of a litigant should not be affected by the delay on the part of the Court in deciding the case and the rights of the plaintiff should be declared as on the date of the suit, ignoring altogether the reconveyance. He further urged that under the gift deed from the widow, the second defendant had acquired only a limited interest to enjoy the property during the lifetime of the widow, and that he could not convey any title higher than what he himself acquired under the gift deed, and that the reconveyance could convey back only a limited estate and will not have the effect of enlarging it into an absolute one. Learned Counsel further contended that in a case where the widow loses possession of the property under an unauthorised alienation, the right of the reversioners as a whole—even though the right of an individual reversioner is only a *spes successionis*—is a very valuable right which has been preserved, to obtain possession of the properties from the alienee on the death of the widow, and that such a right cannot be affected by any dealing *inter se* between the widow and the alienee. In other words his argument is that when certain rights have accrued to third parties, like the plaintiff in the instant case, in regard to certain properties, those rights could not be affected by section 14 of the Hindu Succession Act. I am unable to accept this argument as it proceeds on a misconception of the incidents of a widow's estate under Hindu Law and the rights of the reversioner.

A widow or other limited heir is not a tenant for life but is the owner of the property inherited by her as an heir subject to certain restrictions on alienations and subject to its devolving upon the nearest heir of the last owner upon her death. As pointed out by the Privy Council in *Janaki Ammal* v. *Narayanasami Aiyer*[2], the widow's rights is in the nature of a right of property; her position is that of owner; her powers in that character are, however, limited, but so long as she is alive no one has any vested interest in the succession. The law as to the situation of the reversionary heirs is also quite clear. There is no vesting at the date of the husband's death. It is a mere *spes successionis* and the question as to who is the nearest reversionary heir falls to be decided at the date of the death of the widow.

Before I proceed further, one observation requires to be made regarding the scope and effect of the Hindu Succession Act, particularly that of section 14. It must be borne in mind that the overriding effect of the Act as declared in section 4 is not all embracing, but rules of Hindu Law shall cease to have effect only with respect to matters for which provision has been made in the Act. In other words, on matters for which there is no specific provision in the Act the principles of Hindu Law would still continue to apply though such matters would be very few.

In a recent Bench decision of this Court in *Ramalingam* v. *Punithavalli Ammal*[3] the scope of the overriding effect of section 4 of the Act came up for consideration.

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1. (1958) 1 M.L.J. 101.
2. (1916) 31 M.L.J. 225 : L.R. 43 I.A. 207 : I.L.R. 39 Mad. 634 at page 637.
3. (1964) 2 M.L.J. 571 : I.L.R. (1964) 1 Mad. 664 : A.I.R. 1964 Mad. 320.

In that case a Hindu widow who had inherited her husband's property even before 1937 adopted a son after the Hindu Succession Act came into force and shortly thereafter she executed a settlement deed in favour of her daughter. The Bench held that even though the property in the hands of the widow became her absolute property before the adoption by reason of section 14 of the Act, it was nevertheless subject to defeasance when she made the adoption. It was observed that defeasibility of an estate can co-exist with the absolute character of the same in the owner, *i.e.*, the widow, till the contemplated event, namely, the adoption, takes place. The matter was put thus at page 326 :

> "From what we have stated above, and except in the two types of cases referred to, a divestment by an adopted son of the property in the hands of his mother or any other heir of his father, is by virtue of his own right and not by reason of any restriction or a defect in the nature of the estate possessed by the adoptive mother or any other heir. In all such cases, the person who actually inherits on the death of the last male owner can be regarded only as an intermediate heir with certain powers, and whose estate will be liable to be defeated on an adoption being made to the deceased by his widow."

In considering, how far the provisions of the Act being a Code, will have the effect of nullifying the ordinary law not only in regard to matters expressly provided for therein but matters not so provided, the matter was put thus at page 323 :

> "Therefore while the Act can be regarded as a code and interpreted with reference to matters dealt with by it on the principles referred to above, a different rule of interpretation will have to be adopted where the provisions of the statute indirectly affect an unabrogated part of the pre-existing Hindu Law. That this will be so will be apparent from the very terms of section 4 which statutorily makes the provisions of the Act comprehensive."

The Bench ultimately held that the adopted son's rights will date back and the settlement executed by the adoptive mother would not affect his rights. The principle of this decision applies to the instant case as will be seen presently.

I shall now consider how the position stood between the widow and the alienee till the Hindu Succession Act came into force. Despite the alientation, even if it comprises the entirety of the estate, the widow is not civilly dead but continues to represent the estate. The title of the alienee (where the alienation is not for necessity) is undoubtedly defeasible, the defeasance arising out of the incidents of Hindu Law. If the widow makes an adoption, the adopted son will be entitled to divest the alienee and recover possession of the property. Again, if the widow makes a surrender in favour of the nearest reversioner, the reversioner will be entitled to recover immediate possession of the property from the alienee. If the widow remarries there would be forfeiture of her rights of inheritance and the next heir will be entitled to recover possession of the property from the alienee. The difference of judicial opinion about the consequences of adoption, surrender, remarriage—have all been set at rest by the recent judgment of the Supreme Court in *Natvarlal* v. *Dadubhai*[1], and *Kalishankar Das* v. *Dhirendra Nath Patra*[2]. In *Natvarlal* v. *Dadubhai*[1], dealing with the effect of a surrender, the Supreme Court stated that Law in these terms at page 77 :

> "If such a transfer is made by a Hindu widow, it is not correct to say that the transferee acquires necessarily and in law an interest commensurate with the period of the natural life of the widow or at any rate with the period of her widowhood. Such transfer is invalid in Hindu Law, but the widow, being the grantor herself, cannot derogate from the grant and the transfer cannot also be impeached so long as a person does not come into existence who can claim a present right to possession of the property. As in the majority of cases, persons with such rights come into existence only when the widow dies, it is generally said that the alienee gets the estate for the term of the widow's life. We think that the legal position has been correctly indicated by Kumaraswami Sastriar, J., in the Full Bench case *Vaidyanatha* v. *Savithri*[3]. On the one hand, a Hindu widow has larger rights than those of a life-estate holder, inasmuch, as, in case of justifying necessity she can convey to another an absolute title to the properties vested in her. On the other hand, where there is no necessity for alienation, the interest, which she herself holds and which she can convey to others, is not an indefeasible life estate, but an estate liable to be defeated on the happening of certain events which in Hindu Law cause extinction of the widow's estate. Remarriage by the widow is one such event which completely divests her of any interest in her husband's property. Adoption of a son to her husband is another circumstance which puts an end to her estate as heir to her husband, the effect of adoption being to bring in a

1. (1954) 1 M.L.J. 69 : (1954) S.C.J. 34 : (1955) 1 S.C.R. 467. (1954) S.C.R. 339.
2. (1954) 2 M.L.J. 351 : (1954) S.C.J. 670 : (1954) S.C.R. 339.
3. (1917) 33 M.L.J. 387 : I.L.R. 41 Mad. 75 (F.B.).

son who has prior claims to succession under the Hindu Law. In both these sets of circumstances it is not disputed that prior rights derived from the widow, if not supported by legal necessity, could be defeated by the next heir of the husband or the adopted son as the case may be. If the effect of surrender, as explained above, is to destroy the widow's estate in the same way as if she suffered physical or civil death, there is no conceivable reason why the reversioner should not, subject to any question of fraud or collusion that might arise, be in a position to recover possession of the properties from an alienee from the widow, or from one who has obtained title by adverse possession against her, as none of them could acquire rights except against the widow herself."

In *Kalishankar Das* v. *Dhirendra Nath Patra*[1], the view was reiterated that the transferee gets only the widow's estate which is not even an indefeasible life estate and that it can come to an end not merely on her death but on the happening of other contingencies like remarriage, adoption, etc.

If an alienation is made by the widow and if the same is questioned by a reversioner either in a suit or otherwise, thereby casting a cloud on the title of the alienee, there is nothing in Hindu Law or under the general principles of law of transfer which would prevent the alienee conveying back the property to the alienor, in the same capacity and in the same right in which it was conveyed by the widow. In the case of an ordinary sale if the title of the purchaser is questioned he can convey back the property to the vender and get back the price paid by him. The purchaser can either claim indemnity and damages when he is actually dispossessed or even at the earlier stage when his title is threatened he can convey back the property provided the vendor agrees. The position is the same in the case of every transaction which is voidable at the option of a third party. Take another illustration, if a son or a junior member of a joint family files a suit, questioning the alienation, the alienee can admit the claim and convey back the property in which event the property will be and could be held by the managing member in the same capacity in which it was held prior to the alienation. I do not see why the same rule should not apply in the case of an unauthorised alienation by a widow. If the Hindu Succession Act had not come into force, it is impossible to contend that during the pendency of the suit in the instant case the alienee could not have conveyed back the property to the widow. Equally it could not be contended that when the alienee conveys back the property, the widow could hold it in any capacity other than a Hindu widow. In fact she will suffer under a legal disability from holding the property in any other character. She got the property only as the heir and widow of her husband, alienated the same in that capacity, and she would be clearly estopped from claiming to hold it except as a widow on reconveyance. On reconveyance the property in her hands will be subject to all the incidents of Hindu Law as the property inherited by the widow from the husband.

The argument of learned Counsel for the appellant that when the alienee reconveys the property the widow gets it under a different root of title *i.e.*, the right of the alienee to enjoy the property till the lifetime of the widow alone is conveyed without the incidents of Hindu Law is clearly wrong. If the alienee conveys the property to a stranger the position is entirely different, as in that case the stranger can acquire only the limited right of his alienor. The widow on reconveyance cannot by any process of reasoning be assimilated to the position of a stranger.

Learned Counsel relied upon the decision of the Orissa High Court in *Ganesh Mahanta* v. *Sukriva Bewa*[2]. In that case a donee from a widow prior to the commencement of the Act re-transferred the property in favour of the widow after the Act came into force. It was held that the widow would acquire only a limited interest and that the donee cannot transmit any title higher than what he himself had. It was also held that section 14 (1) would not enlarge the estate of the widow on reconveyance. The learned Judge put the matter thus at page 168 :

"As I have discussed above defendant 2 acquired only the widow's estate by the gift in his favour. His re-transfer on 13th February 1957 by Exhibit B, even if genuine and not fraudulent or collusive as has been held by the trial Court, would transmit to Lata the same title which defendant 2 himself had..

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1. (1954) 2 M.L.J. 351 : (1954) S.C.J. 670 : (1955) 1 S.C.R. 467.

2. A.I.R. 1963 Orissa 167.

In this regard the declaration made in O.S. No. 138 of 1946-47 that her gift in favour of defendant 2 was not binding on the reversioners after her death, does not make any difference in the legal position. Even if such a suit had not been filed, the interest of the alienee or the donee in the property would be that of a limited owner. Section 14 (1) does not purport to enlarge the right, title or interest of the alienee with regard to the transfer effected prior to the commencement of the Act. By Exhibit B Lata would again get the widow's estate. The position would be made clear by an illustration. Supposing defendant 2 had effected a transfer not in favour of Lata but in favour of another male who is in law always entitled to hold the property as a full owner. Would the transferee in such a case acquire a limited right, or a full ownership? The obvious answer is that he would acquire only a limited right as the donee cannot transmit any title higher than what he himself had. The position does not become in any way different merely because defendant 2 re-transferred the property in favour of a female. Though the transfer is subsequent to the Act, Lata acquired only a limited right and did not acquire full ownership on account of the limited nature of the interest of the transferor. The trial Court has found that Exhibit A was without consideration. Even if it were for consideration, Lata would not transmit a higher title than what she got by Exhibit B."

With respect I am unable to agree with this view, as the entire reasoning is based upon the view that there is no difference between a reconveyance in favour of the widow herself and alienation in favour of the stranger. In my opinion there is all the difference between a case of annulment of a conveyance by consent of both the parties and a case of a subsequent alienation by the alienee in favour of a stranger. In the former case the effect of the alienation is completely wiped out and the original position is restored. This distinction has not been noticed in the decision of the Orissa High Court. The acceptance of the contention urged by learned Counsel for the appellant would lead to startling results. Take for instance an unauthorised alienation by a guardian. If some cloud is cast on the validity of the alienation, and if the alienee, not willing to take any risk till the attainment of majority by the minor, conveys back the property to the guardian, it would not be open to the guardian to contend that he had acquired the voidable title of the alienee. In other words he cannot contend as against the quondam minor that the income from the property would be his, and that till the minor takes proceedings for setting aside the alienation the guardian should be deemed to have acquired the right, title and interest of the alienee. Such a contention on the face of it is untenable. The instance of an alienation by a trustee or an executor may also be considered. If after the alienation by the trustee or executor the beneficiary raises some objection about the validity of the alienation whther well founded or ill founded and if the alienee who is not prepared to take any risk conveys back the property to the trustee or the executor as the case may be, it cannot possibly be contended that the trustee or the executor got back the property in any right or character other than in which it was originally alienated. As a result of the reconveyance the property would form part of the trust estate. In all these cases the alienor suffers under a legal disability from holding the property in any other capacity, it is needless to multiply instances. I am therefore clearly of the opinion that there is nothing in law to prevent an alienation being completely nullified as if it never took effect provided the alienor and the alienee agree to such a course. The position is, *a fortiori*, where the title conveyed to the alienee, is a voidable one. It cannot be disputed that when the reversioner files the suit it is open to the alienee to submit to a decree. After such a declaratory decree is passed there is nothing in Hindu Law which compels or obliges the alienee to retain and keep the property himself and hand it over to the reversioner. It is certainly open to him to respect the decree and convey back the property, to the widow even before her death. It is obvious that what the alienee can do after the termination of the suit can equally be done during its pendency. Surely the alienee is not a trustee for the reversioner to keep the property in trust and deliver the property on the death of the widow.

If this is the legal position till the Hindu Succession Act came into force the question arises whether section 14 brings about different results. Section 14 while it enlarges the limited estate of a female subject to the conditions in sub-sections (1) and (2) thereof, does not otherwise abrogate or render inapplicable other rules or principles of Hindu Law. In fact the recognition of the continuance of the right of the reversioner to file the suit when the widow had alienated and parted with possession of the poperties is itself founded upon Hindu Law of reversionary succession.

It is obvious that when this right of the reversioner is recognised despite section 14 the right must be subject to all the incidents of Hindu Law referred to earlier. In other words section 14 is completely out of the picture and principles of Hindu Law alone will determine the fate of the suit. The question therefore arises as to what exactly were the precise rights of the reversioner when he filed the suit and how far the doctrine of *lis pendens* would improve his position or would protect his rights. The doctrine of *lis pendens* would not confer upon the reversioner any rights higher than what he had on the date of the suit, but would only safeguard his rights whatever they were on the date of the suit. From what has been observed above it will be seen that the right of the reversioner to get a declaration of invalidity of the alienation is itself a precarious and defeasible right in its very nature. The institution of the suit does not carry with it a right in the reversioner to prevent the alienee from reconveying the property back to the widow. The right of the alienee to reconvey the property which inhered in him upto the moment of the suit cannot be controlled or curtailed by the institution of the suit.

After the alienee reconveys the property, section 14 (1) undoubtedly comes into play. Section 14 would apply to any property acquired by the widow before or after the commencement of this Act. Where the property was acquired by the female Hindu before the Act came into force she must be in possession of the property at that time or she must have a legal right to such possession, and in either case the estate would get enlarged. In the case of acquisition of property after the coming into force of the Act, the matter admits of no doubt because the very scheme of the Act is to abolish altogether limited estate and to wipe out all distinctions between a male and a female. Take for instance a settlement executed by a Hindu male whether before or after the commencement of the Act, the deed of settlement containing a clause for defeasance or divestiture on the happening of an event *i.e.*, the settlee marrying a woman of a particular community without any provision as to who should take the vested remainder on such a contingency. After the settlement has taken effect and if the contingency occurred after the Act had come into force at a time when the settlor was dead leaving a widow as heir the latter would become entitled to the vested remainder as the heir of the settlor. There can be no doubt that in such a situation section 14 would apply and enlarge the estate into an absolute one, even though the title or the right to possession accrued only after the Act came into force. The crucial fact is that the right accrued to a Hindu female. Adopting the same principle in the instant case that title and possession acquired by the widow, though after the Act, would become enlarged under section 14. Looked at from any point of view I am clearly of the opinion that by reason of the reconveyance the reversioner's suit has become useless and cannot be prosecuted any further, as the widow has become the absolute owner of the property. For all purposes, the intervening alienation and the reconveyance will have to be left out of account and the widow should be regarded as enjoying the property as an heir to her husband. After the dictation of the judgment and before delivery I noticed a judgment of the Punjab High Court in *Teja Singh* v. *Jagat Singh*[1], in which the same view as I have indicated above has been taken. It that case a widow gifted the property inherited by her from her husband in 1938 and the reversioner had obtained a declaration that the alienation would not bind the reversioner after the death of the widow. After the Hindu Succession Act came into force, on 3rd June, 1959 the alienee gifted back half the property to the widow under a deed of reconveyance and the widow died on 29th October, 1959. The widow alienated this half in favour of defendants 5 and 6. The reversioners filed the suit for declaration that this subsequent alienation by the widow in favour of defendants 5 and 6 would not bind the reversioner. Mahajan, J., held that the effect of both the alienation and the gift back put together was that the widow by her own act nullified the alienation made by her and became the absolute owner of the property, and that the presence or absence of a declaratory decree merely avoided the alienation and it did not prevent the parties to it to put an end to it. I may refer to the following observations at pages 405, 406 :

1. A.I.R. 1964 Punj. 403.

"What the alienee validly and unquestionably acquires under an unauthorised alienation from a widow is the limited interest. What he passes back is again the limited interest. So at two points of time, what the widow parted with was a limited interest and what she reacquired again was that very interest. The gift and the gift back have not and could not enlarge the widow's limited interest. Therefore, there is no question of any declaratory decree either stepping in this situation to undo what could not be done. The declaration merely undid the gift after the death of the widow. It did not prevent the widow to undo the gift in her lifetime. Nor it could, for what the parties can validly do, they can also by mutual consent undo it later. This course would merely make the declaratory decree inoperative for what it sought to achieve after the death of the widow is achieved in her lifetime, thus rendering the declaratory decree useless ....

In my view the presence or the absence of a declaratory decree would make no difference. The declaratory decree avoids the alienation. It does not prevent the parties to it to put an end to it. If they do so after the declaratory decree, they are in fact obeying the decree and giving effect to it and thus serving the purpose of the decree. The parties are thus restored back to the same position in which they were before the alienation."

The learned Judge followed the Bench decision of the Lahore High Court in *Muhammad Rafiq* v. *Faiz Ahmed*[1], in which it was held that after a decree had been obtained by a reversioner regarding the alienation by a widow, it would be open to the parties by mutual consent to have the sale annulled, on the ground there was nothing in law to prevent the parties by mutual agreement to cancel and nullify an earlier sale and thus restore back the parties to their original position.

The result therefore is the Second Appeal is dismissed but under the circumstances the parties shall bear their own costs throughout. No leave.

P.R.N. ——— *Appeal dismissed; Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

Chattanatha Karayalar .. *Petitioner**

v.

The State of Madras represented by the District Collector, Tirunelveli and another .. *Respondents.*

Travancore Cochin Electricity Duty Act, 1950, *sections* 3 (1) *and* (2) *and* 9 (2) (a) *and* (b)—*If* ultra vires *on ground of excessive delegation—Duty of Legislature to fix rate of tax or duty or to lay down the principles to guide the Executive—Legislature leaving it to the Executive to fix the rate or quantum, the manner of levy, the subject to levy and the exemption limit*, etc.—*Permissibility of delegation*—Res judicata—*Applicability—Assessment orders relating to different periods based on different causes of action—Bar of* res judicata.

Section 3 (1) and (2) and section 9 (2) (*a*) and (*b*) of the Travancore-Cochin Electricty Duty Act, 1950, in so far as they leave it to the State Government to determine the quantum of the rate of duty and the limit of exemption from duty, without indicating any policy, limit or principle, must be held to constitute excessive delegation of legislative power and are therefore unconstitutional and *ultra vires*. Rule 3 (1) of the Travancore-Cochin Electricity Duty Rules, 1950, framed under the rule-making power conferred by the Act is also *ultra vires*. Consequently any demand for payment for duty levied in pursuance of the above rule framed under the Act is without authority and illegal.

The Act in effect, directs that a duty on sales of electrical energy at more than two annas per unit shall be levied and that the Government shall determine the rate of duty, the manner of its payment by a licensee and the exemption limit of total sales attracting duty, and confers the corresponding rule-making power. There is no indication whatever in the Act as to how the Government is to determine and fix the quantum of the rate of duty. That is entirely left to the discretion of the Government which can exercise it as it pleases without any restriction. Likewise the limit of total sales of energy exempt from duty is left to the will and pleasure of the rule-making power of the Executive. The discretion so vested in the Government by section 3 (1) and (2) as well as by section 9 (2) (*a*) and (*b*) is thus totally uncontrolled, unguided and unlimited.

The Legislature is certainly entitled to delegate its power to the Executive and its officers, but this it can do only subject to certain conditions, limitations and restrictions. The Legislature is not competent to totally abdicate its legislative functions in favour of the Executive. Before it can validly do so, it must indicate its policy, the principles and limits subject to which alone it can ask the Executive to carry out its purpose by making appropriate rules. The Legislature itself has to determine the rate of tax or should indicate the principles for fixation of the rate by the Executive. It cannot say that the Executive may fix the tax at any rate it may think fit. To do so would be excessive delegation.

1. A.I.R. 1933 Lah. 597.

* W.P. No. 639 of 1962. 9th October, 1964.

To levy a tax is matter of policy and peculiarly a legislative function, and so too fixation of the rate of tax to be levied and the subject of taxation. Neither of them can be left to the Executive for determination. But once the Legislature provides for the levy of tax and prescribes itself the rate the quantum of tax or duty may vary in the light of the principles indicated by the Legislature. There is no objection to the Legislature leaving to the Executive the manner of levy and collection and the machinery for collection by making suitable rules. To leave the determination of the rate to the Executive without indicating clearly the principles for determination cannot be regarded as permissible delegation.

Quaere : Whether the principle of *res judicata* can be applied to assessment orders pertaining to different periods based on different causes of action ?

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of Prohibition prohibiting the respondents herein from collecting under the Revenue Recovery Act, the sum of Rs. 51,882-29NP., being the Electricity Duty payable by the petitioner in pursuance of the demand made by the Tahsildar, the 2nd respondent herein, dated 19th April, 1962.

K. Rajah Iyer and *K. Hariharan*, for Petitioner.

The Advocate-General and *K. Venkataswami* for the Additional Government Pleader on behalf of Respondents.

The Court made the following

ORDER.—This petition raises the question of the constitutional validity of sub-sections (1) and (2) of section 3 and clauses (*a*) and (*b*) of sub-section (2) of section 9 of the Travancore-Cochin Electricity Duty Act, 1950 and of sub-rule (1) of rule 3 of the Travancore-Cochin Electricity Duty Rules, 1950. A further question also is raised that the vires of the said sub-rule is covered by a judgment of the District Court, Trivandrum in O.S. No. 104 of 1955 on its file, in which the petitioner was the plaintiff and the Travancore-Cochin State was the defendant, and that the judgment operates as *res judicata*, and is binding on the State of Madras.

The petitioner was a licensee for distribution of electricity in Shencottah taluk under a licence initially issued by the then Travancore-Cochin Government in 1114, M.E. and has been distributing electricity in that taluk under a licence, subsequently issued by the Travancore-Cochin Government under section 3 (3) of the Travancore-Cochin Electricity Duty Act, 1950. The petitioner was then functioning under the name and style of Shencottah Electric Supply Agency. The licence covered also the distribution system over the Punaloor area which was, however taken over by the Travancore-Cochin Government in 1951, leaving to the petitioner only the distribution of electricity in the Shencottah area.

As a result of the States Reorganisation Act, 1956, Shencottah Taluk merged in the territory of the State of Madras with effect from 1st November, 1956. The Madras Government, through its officers, made several demands on the petitioner for payment of electricity duty to which he had been assessed under section 3 (1) of the said Act which, by Adaptation of Laws, continued to be in force in that Taluk until 31st March, 1961. The petitioner having defaulted, coercive steps were taken in April, 1961, demanding payment, within a specified time, of Rs. 51,882-29NP. as arrears of revenue due from him for the period from 1st November, 1956, to 31st March, 1961, towards electricity duty. The coercive steps included also the attachment of the petitioner's properties presumably under the provisions of the Madras Revenue Recovery Act treating the dues as if they were arrears of land revenue for the purpose of collection. The petitioner has come to this Court under Articles 226 of the Constitution asking for a direction restraining the respondents from collecting the amount as electricity duty from the petitioner.

The contention for the petitioner is that sub-sections (1) and (2) of section 3 and clauses (*a*) and (*b*) of sub-section (2) of section 9 of the Act make excessive delegation of legislative power, without indicating any standard or guiding principle and are therefore void, so that the demand made on the petitioner is without any authority of law and cannot be enforced, in view of Article 265 of the Constitution. The

Travancore-Cochin Electricity Duty Act, 1950, which was enacted with the avowed purpose of levying a duty on certain sales of electrical energy effected by licensees in the State of Travancore-Cochin contains nine sections of which, section 2 relates to definition, section 3 is the charging section, the fourth requires the licensee to keep certain books of account in the prescribed form, the fifth confers powers on the Government to appoint Inspecting officers, the sixth provides for recovery of duty due under the Act as if it was an arrear of land revenue, the seventh provides for the licensee to reimburse himself from the consumer in certain cases, the eighth contains penalties and the ninth confers power on the Government to make Rules to carry out the purpose of the Act. Sub-sections (1) and (2) of section 3 read :

"3. *Levy of a duty on certain sales of electrical energy.*—(1) Save as otherwise provided in sub-section (2) every licensee in the State of Travancore-Cochin shall pay every month to the Government in the prescribed rate on and in respect of all sales of energy effected by the licensee during the previous month at a price of more than two annas per unit.

(2) A licensee shall be exempt from duty under sub-section (1) in any month if the total sales of energy effected by him at a price of more than two annas per unit in the previous month, did not exceed the prescribed limits.

There is a proviso to sub-section (2) but it need not be set out, as it is not important and no arguments were addressed to me based on it. The word "prescribed" is defined by section 2 to mean prescribed by Rules made under the Act. A duty is levied by section 3 (1) on sales of electrical energy at a price of more than two annas per unit effected in the previous month but the rate at which the duty is to be imposed on such sales is left to the rule-making authority. So too the manner of payment of the duty by the licensee every month shall be as prescribed by Rules. The limit above which the total sales of energy at a price of more than two annas per unit in the previous month will attract electricity duty is left by sub-section (2) of section 3 to Rules to be made under the Act. In other words, the rule-making authority is to fix the limit of total sales of enery for exemption from electricity duty. The corresponding power to make Rules is conferred by sub-section (2) of section 9, and by clause (*a*), the Rules may provide for the time and the manner of payment of duty and also the rates thereof under section 3 (1) and by clause (*b*), the limit for the sales of energy at a price of more than two annas per unit above which the duty will become payable. In exercise of this rule-making power, the Travancore-Cochin Government made the Travancore-Cochin Electricity Duty Rules, 1950. Sub-rule (i) of Rule 3 provides that the duty referred to in section 3 (1) of the Act shall be paid at the rate of nine pies per unit of energy sold at a price of more than two annas per unit. The same sub-rule further provides that a licensee shall be exempted from duty in any month if the total sales of energy effected by him in the previous month at a price of more than two annas per unit did not exceed 8,333 units. A proviso to this sub-rule states that, if at the end of any financial year, it is found that the total sales of energy effected by the licensee in such year at a price of more than two annas per unit were not less than 100,000 units, the licensee shall pay the duty in respect of any month or months comprised in such year in which the sales of energy effected by him did not exceed 8,333 units. Power also is reserved under this sub-rule for the Government to change the Rules and the prescribed limits attracting duty. Sub-rule (ii) of Rule 3 prescribes the time and manner of payment of electricity duty. In effect, what the Act does is to direct that a duty on sales of electrical energy at more than two annas per unit shall be levied and that the Government shall determine the rate of duty, the manner of its payment by a licensee and the exemption limit of total sales attracting duty and confers the corresponding rule-making power. There is no indication whatever in the Act as to how the Government is to determine and fix the quantum of the rate of duty. That is entirely left to the discretion of the Government which can exercise it as it pleases and without any restriction. Likewise, the limit of total sales of energy exempt from duty is left to the will and pleasure of the rule-making power of the Executive. The Preamble to the Act merely announces the policy of the Legislature to levy a duty on certain sales of electrical energy effected by licensees in the State of Travancore-Cochin and contains no further guidance at all to the Executive. One cannot gather from the

sections read individually, or as a whole, any principle or limits with reference to which, or subject to which, the Government is to fix the quantum or the rate of duty to be levied and lay down the exemption limit of sales for levy of duty. The discretion so vested in the Government by section 3 (1) and (2) as well as section 9 (2) (*a*) and (*b*) is thus totally uncontrolled, unguided and unlimited.

The Legislature is certainly entitled to delegate its power to the Executive and its officers but this it can do only subject to certain conditions, limitations and restrictions. The Legislature is not competent to totally abdicate its legislative functions in favour of the Executive under the Constitution. Our Constitution is based on separation of powers as between the Judiciary, the Legislature and the Executive and each of these bodies is entrusted with specific powers for their exclusive exercise and none of them is free to abdicate its powers in favour of any of the others. But this is not to say that the Legislature cannot delegate its powers at all. Before it can validly do so, it must indicate its policy, the principles and limits subject to which alone it can ask the Executive to carry out its purpose by making appropriate rules. Any delegation by the Legislature of its power in disregard of these requisites will be in excess of its competence and will be invalid. Once the policy is indicated by the Legislature and it lays down the principles for carrying it out, it may well leave it to the Executive to fill up the details, fashion and bring into being the machinery essential to effectuate the purpose of the legislation. For that purpose, discretion may be properly left to the Executive to make Rules but the discretion so left, should be such as is guided, controlled and limited by the Legislature.

To levy a tax is a matter of policy and peculiarly a legislative function ; and so too fixation of the rate or quantum of tax to be levied and the subject of taxation. The quantum of rate of tax is necessarily connected with the levy of tax and it is the function of the Legislature to legislate in respect of both of them. Neither of them can be left to the Executive for determination. But once the Legislature provides for levy of tax and prescribes itself the rate, the quantum of tax or duty may vary in the light of the principles indicated by the Legislature ; there is no objection to the Legislature leaving to the Executive, the manner of levy and collection, and the machinery for collection by making suitable Rules therefor. But that is not what the Act here in question has done. All that it stated was that there shall be a duty on sales of energy. The Act stated nothing about the quantum of rate to be charged or the limits within which the Government in exercise of its rule-making power may fix the rate. Nor did the Act lay down the principles or give indications with reference to which the rule-making authority may be guided in the exercise of its powers for fixing the quantum of rate.

In *Shanmugha Oil Mills* v. *Coimbatore Market Committee*[1], which was a case under the Madras Commercial Crops Market Act, 1933, this Court, after observing that the rate of tax like the tax itself is a legislative function, held :

> "Section 11 (1) does not purport to limit the power of the Executive Government to levy cess by way of sales tax at the rates already fixed or to any particular amount but instead, it gives uncontrolled powers in the matter of fixation of rate of tax. That is illegal."

This view was in effect upheld on appeal in *State of Madras* v. *Shanmugha Oil Mills, Erode*[2]. *Calcutta Corporation* v. *Sarat Chandra*[3], was concerned with the validity of section 229 of the Calcutta Municipal Act in so far it left the determination of the rate of tax to the Corporation with the approval of the State Government. Das Gupta, C.J., as he then was, who was a member of the Court which decided the case, held :

> "To my mind the most important question of policy which the Legislature has to determine in a taxing statute is the question of the rate of tax. To leave the determination of this matter to any other authority without indicating clearly principles for determination cannot be considered to be permissible delegation."

1. (1960) 1 M.L.J. 298 : I.L.R. (1960) Mad. 171 at 181.
2. I.L.R. (1963) Mad. 12.
3. A.I.R. 1959 Cal. 704 at 708.

Bachawat, J., as he then was, who was the other member of the Court, accepted that levy of tax was a legislative function but considered that it might be delegated to a quasi-legislative local body. But that is a different question. On the general principle whether a rate of tax can be left to the determination of the Executive without any guiding principles laid down by the Lgislature, I find myself in respectful agreement with the observations of Das Gupta, C.J. The Legislature itself has to determine the rate of tax or should indicate the principles for fixation of the rate by the Executive. The Legislature cannot say that the Executive may fix the tax at any rate it may think fit. The Travancore High Court was of the same view: *Standard Motor Union* v. *State of Kerala*[1].

I have therefore no hesitation in holding that sub-sections (1) and (2) of section 3 and clauses (*a*) and (*b*) of sub-section (2) of section 9 of the Act, in so far as they left to the State Government to determine the quantum of the rate of duty and the limit of exemption from duty, without indicating any policy, limit or principle, constituted excessive delegation of legislative power and were, therefore, unconstitutional. It follows that the demand made on the petitioner was without authority and was illegal.

On the view I have taken on the *vires* of the said provisions in the main Act, it will be unnecessary to consider the other point for the petitioner, relating to *res judicata*. But briefly the argument is that having regard to certain provisions of the States Reorganisation Act, the State of Madras is a successor State in respect of the Shencottah Taluk becoming part of the territory of this State, and the judgment of the District Court of Trivandrum should be deemed to be binding on it. The petitioner had instituted O.S. No. 104 of 1955 on the file of that Court for a declaration against the Travancore-Cochin State that the order of its Government dated 15th September, 1954, assessing him to electricity duty was illegal and void on the ground, among others, that section 9 of the Act and the Rules made thereunder were *ultra vires* and incompetent. In view of the constitutional question raised, the Travancore High Court withdrew the suit to its file, but when it came up for hearing, it would appear that learned Counsel for the plaintiff conceded that he would not raise any attack against the statute itself and would confine his contention to the validity of the Rules on the ground of excessive delegation of authority in the matter of assessment to electricity duty under the statute. In view of this concession, that High Court thought that no longer was the constitutional validity of the statute in controversy and, on that view, sent back the suit to the District Court for disposal on the question, among others, of the validity of the Rules framed under the Act. The District Court, however, found that section 9 gave excessive authority to the Executive and that the Rules framed fixing the rate and the limit of exemption were therefore invalid. Section 78 of the State Reorganisation Act provides that the right to recover arrears of any tax or duty on property shall belong to the successor State in which the property is situated. Section 123 is to the effect that where immediately before the appointed day, the existing State was a party to any legal proceeding with respect to any property, rights or liabilities subject to apportionment under the Act, the successor State which succeeded to or acquired a share in that property or those rights or liabilities by virtue of any provision of the Act should be deemed to be substituted for the existing State as a party to those proceedings or added as a party thereto as the case may be and the proceedings might continue accordingly. Section 125 (1) states that every proceeding pending before the appointed day before a Court, other than the High Court in any area which, on that day, fall within a State shall, if it is a proceeding relating exclusively to any part of the territories which as from that day are the territories of another State, stand transferred to the corresponding Court in the other State. The argument for the petitioner is that since on the appointed day his suit was pending and as the Madras State was entitled to collect the arrears of duty prior to that date under section 78 in so far as the arrears related to the Shencottah Taluk, the State of Madras should

1. 1961 K.L.J. 1235.

be deemed to have been a party to the suit when it was decreed in 1963 and the finding in the suit therefore is binding on it. I do not think that the argument is valid. As I mentioned, it was conceded for the petitioner before the High Court of Kerala that he would not raise any question of *vires* of the statute itself and would confine his contention to the validity of the Rules under the Act. That High Court while remitting the suit in so many words stated :

"We make it clear that the question of the constitutionality or *vires* of the statute is not to be considered in these proceedings."

The District Court was aware of its limitations while disposing of the suit and notwithstanding its observations in respect of section 9 of the Act, it should be taken that its decision was confined to the validity of the Rules. Further, the demand in question in this Petition relates to arrears of duty accrued subsequent to 1st November, 1956, while the arrears covered by the suit related to the period prior to that date. It is doubtful whether the principle of *res judicata* can be applied to assessment orders pertaining to different periods and based, therefore, on different causes of action. No doubt the Supreme Court in *Amalgamated Coalfields* v. *Janapada Sabha*[1] pointed out that in considering such a question it would be necessary to distinguish decisions on questions of law directly and substantially arising in any dispute about the liability for a particular year and the questions of law arising incidentally or in a collateral manner. But on the question whether, where the statute on which the earlier assessment proceeding was based, was held to be valid the decision would not operate as *res judicata* against the assessee for a subsequent year, the Supreme Court expressed no definite opinion in that case. But as I said, in view of my finding in favour of the petitioner on the question of the *vires* of the said provisions of the Act, I do not have to pursue this question of *res judicata*.

The petition is allowed with costs. Counsel's fees Rs. 250.

P.R.N. —— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

Athayee and others .. *Appellants**

v.

Shanmugha Goundan .. *Respondent.*

Wills and Settlements—Rules as to proof—Distinction between wills and settlements—Onus—When material and important—Principles.

With regard to proof of a will it is a well-settled rule that the *onus probandi* is on the propounder of the will. He has to establish by clear evidence that the will was executed by the testator and that at the time of the execution of the will he was a free agent and possessed of a sound and disposing state of mind. It makes no difference to this burden whether the propounder is a petitioner in a probate proceeding or a defendant in a suit involving, in his defence, propounding the will.

The onus of proof may be increased by circumstances such as unbounded confidence in the drawer of the will, extreme disability in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument.

Where the propounder is shown to have participated in the execution of the will in the sense that he actively assisted the executants, and also obtained a bounty, substantial or otherwise, under the will, these circumstances raise a suspicion which the propounder will have to remove in order that the Court may uphold the will.

But the rules of proof are not the same in the case of a settlement or gift or conveyance, since there is one important feature which distinguishes a will from other documents such as a settlement. A will speaks from the death of the testator, and the question always would arise after his death, unlike in the case of a conveyance or settlement which takes effect according to the tenor immediately or on a specified date.

No doubt, in the case of a will as well as a settlement deed, the person who relies on either has to prove its execution, that is, that the executant signed the document and it was duly attested. But once

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1. A.I.R. 1964 S.C. 1013.

* Appeal No. 207 of 1961. 22nd October, 1964.

that is done, the person who relies on a settlement would not further be called upon to show that the executant executed the deed while he was in a sound and disposing state of mind. Where the fact is disputed, it is the party who raises a dispute that will have to prove it. Where the execution is proved it may well be taken for granted in the case of a settlement or conveyance that the executant knew its contents and was capable mentally and otherwise of making the disposition and understanding the same unless the person asserting the contrary establishes his case. But the significance of these rules is confined to a state where the evidence at a trial is so evenly balanced that the Court has necessarily to decide on the question of onus as to whether it has been discharged by the party on whom it lay. Where, however, the effect of the entire evidence on record is assessed and the balance is entirely in one way, the importance of the onus recedes to the background.

Appeal against the Decree of the Court of the Subordinate Judge of Salem, dated 20th August, 1960, and passed in Original Suit No. 74 of 1950.

R. Gopalaswamy Ayyangar and *M. Srinivasan*, for Appellants.

R. Ramamurthi Ayyar and *R. Ramachandran*, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal by the plaintiffs arises out of a suit for partition and separate possession and turns on the validity of a settlement deed dated 12th March, 1958, and executed by one Nainamalai Goundan. The properties in dispute admittedly belonged to him absolutely, he having obtained the same as and for his share at a partition on 15th July, 1943, between himself and Guruswami Goundan, his nephew. Nainamalai died in August, 1958, and the plaintiffs are his widow who died *pendente lite* and four of his daughters and grandchildren by a predeceased daughter. The defendant is also a grandson of Nainamalai by his eldest daughter who too had predeceased him. On her marriage the eldest daughter with her husband and the defendant lived with Nainamalai and his wife. A few years before the suit, the defendant's mother died and his father took a second wife from another family with the result that he sent out of the home of Nainamalai to live separately. But the defendant continued to live with Nainamalai, his grandfather and when he came of age he looked after his properties. Four of the plaintiffs who were Nainamalai's daughters had all been married and were living with their relative husbands. On 21st May, 1951, Nainamalai executed a will and registered the same. Nainamalai was 63 years of age then. By that will he bequeathed absolutely, after his life-time, the suit properties in favour of the defendant. The testator also made provisions in the will for payment of a sum of Rs. 1,500 to each of his four daughters and a sum of Rs. 500 to each of his two grandchildren. The testator expressed his hope in the will that he and his wife would be maintained by the defendant until their death and thereafter he would perform their obsequies. Nainamalai superseded his will by his settlement deed the provisions of which were substantially the same as in the will except that the settlor put the defendant in possession of the properties immediately and directed him to make the cash payments as provided in the will but within a period of two years. The settlor also mentioned that so far as the 6th plaintiff was concerned, she had already been paid a sum of Rs. 1,500 by him and therefore he made no further provision for her in the settlement. The plaintiffs claim that the will as well as the settlement were got executed under undue influence, coercion and fraud, while Nainamalai was ill, weak of intellect and feeble in body and mind and that therefore the plaintiffs as well as the defendant were entitled to share in the suit properties. The suit was resisted by the defendant denying the infirmities alleged in respect of the two documents and maintained that in the circumstances of the case it was quite natural for his grandfather to have executed the will as also the settlement deed on the terms they contained in his favour and while he was in a sound and disposing state of mind. Though some argument was addressed to us as if there was any dispute about the execution of the two documents, it is clear from the pleadings that it was never in issue between the parties. In fact, the plaint proceeded on the footing the Nainamalai had executed them and the only question raised by the plaintiffs was that they could have no effect on the grounds above mentioned. There were other issues relating to the question whether the first plaintiff or the defendant was in possession of the properties after the death of Nainamalai.

The Court below found in favour of the defendant on the issue whether the settlement deed was vitiated by undue influence, coercion and fraud, as well as the issue relating to possession of the suit properties. It is the propriety of the finding of the Court below as to the validity of the settlement deed that was under attack before us on behalf of the appellants.

Mr. Gopalaswami Iyengar for the appellants contends that the circumstances of the case clearly show that the will as well as the settlement deed were not natural and free dispositions by Nainamalai, but were the result of undue influence and coercion on the part of the defendant. Learned Counsel says that there was no reason for Nainamalai to distinguish and differentiate between his heirs and make an exclusive preference in favour of the defendant to the detriment of his own daughters and other grandchildren by them. Before the will and settlement deeds were executed, the evidence is that Nainamalai consulted two lawyers at Salem and they were, in fact drafted with their assistance. The argument for the appellants before us is that the omission to examine the lawyers, who would give best evidenec as to the mental capacity of Nainamalai at the time he executed the documents, is a significant fact which goes a long way to probabilise the case of the appellants that Nainamalai was not of a free and disposing state of mind at the time of the execution of the documents. Further, according to Counsel, the attestors who have been examined at the trial by the defendant are only those who were interested or related to him and the independent attestors to the documents have not been examined. Nor, according to Counsel, was any independent evidence directed to prove the circumstances which made Nainamalai prefer the defendant as the sole object of his bounty ignoring the welfare of his daughter and other grandchildren. The two documents, according to the appellants, were executed in secrecy; the original drafts never saw the light of day and neither Nainamalai nor any one made known to others the existence of the two documents until the settlor's death. Finally, Counsel for the appellants urges that is a case in which the defendant himself participated in the steps for execution of the two documents and he was also a substantial, if not the sole, beneficiary, and that being the case, not only was the defendant bound to prove the execution of the two documents and the sound and disposing state of mind of the executant, but he was also bound to remove the suspicion arising out the fact that he was a participant in the execution and recipient of a substantial bounty under the documents. On the other hand, Mr. Ramamurti Iyer for the defendant would say that the will as well as the settlement were the most natural because the defendant was born in the house of Nainamalai and ever since had been living with him, managing his properties when he came of age and thus became the most loved of the grandchildren. Learned Counsel would concede that Nainamalai was no doubt affectionate towards his daughters and other grandchildren, but he would urge that the evidence would bear out that he was more affectionate, attached and devoted to the defendant who was brought up by Nainamalai and his wife and who was part of the household assisting them in their old age. It is further urged by Mr. Ramamurti Iyer that there is nothing in the record of evidence to show that Nainamalai was not in a sound and disposing state of mind, that, on the other hand, the whole evidence would tend to show that at all material times his only ailment was either headache or trouble with the eye or rheumatic pain in the leg so that his mental powers were quite sound and he could discriminate and was in a position to appreciate the disposition he made by the will as well as the settlement. Learned Counsel for the respondent would also say that what the Court has to decide is whether the settlement is affected by any infirmity alleged by the plaintiffs and no question directly arose in respect of the validity of the will except that it will have a bearing on the probability, truth and validity of the settlement itself. We shall presently proceed to consider these rival contentions.

Before we do so we would like to refer to the well-settled rules relating to the proof of a will or a settlement deed. The *onus probandi* is on the propounder of the will. By clear evidence he has to establish that the will was executed by the testator and that at the time of its execution he was a free agent and possessed of a sound and disposing state of mind. It makes no difference to this burden whether the pro-

pounder is a petitioner in a probate proceeding or a defendant in a suit involving in his defence propounding the will. Where the propounder is shown to have participated in the execution of the will in the sense that he actively assisted the executant, and also obtained a bounty substantial or otherwise, under the will, these circumstances raise a suspicion which in order that the Court may uphold the will, the propounder will have to remove. These rules were laid down by English Courts as early as 1838 which have throughout been followed by generations of Judges in this country too. In *Barry* v. *Butlin*[1], the rules were formulated thus :

> "The first that the *onus probandi* lies in every cases upon the party propounding will; and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. The second is, that if a party writes or prepares a will, under which he takes a benefit, that is a circumstance that ought generally to excite the suspicion of the Court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favour of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased."

In the same case there was a further observation that

> "the onus of proof may be increased by circumstances, such as unbounded confidence in the drawer of the will, extreme debility in the testator, clandestinity, and other circumstances which may increase the presumption even so much as to be conclusive against the instrument."

These rules were considered by the Judicial Committee in *Harmes* v. *Hinkson*[2], which was an appeal from the Supreme Court of Canada, and explained. There the Privy Council pointed out that onus in this context as a determining factor of the case can only arise if the tribunal finds the evidence *pro* and *con* so evenly balanced that it can come to no conclusion. In such a case the onus, of course, will decide the matter. Whether or not the onus is satisfied will, of course, be a question of fact in each case. As to the second rule, the Privy Council observed :

> "The second rule has commended itself to many generations of judges and has thus rightly acquired the status of a rule of law, but it is no more than an application to particular circumstances of a principle which may be supposed to guide all persons of prudence and good sense in their ordinary affairs. The principle is that when the only man who can prove a fact has a strong motive for asserting it, his evidence must be received with greater caution than that of a disinterested witness and that every circumstance of legitimate suspicion which is found to exist must make any reasonable man less ready to accept his uncorroborated testimony. The rule applies this general principle to the particular case of a will. It warns the Judge that, in circumstances such as exist in the present case, the evidence of the witness who drew the will must be received with caution, but this does not mean that it must be rejected altogether. The burden of proof may be discharged. The adverse presumption may be rebutted."

These principles were substantially reiterated and affirmed as applicable to proof of wills in this country by the Supreme Court in *M. Venkatachala Iyengar* v. *Thimmajamma*[3]. The Supreme Court observed :

> "The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will."

When this is done, the onus as to the first rule of proof of wills is satisfied. But if suspicious circumstances are present which would include the case of a propounder taking a prominent part in the execution of the will which confers a substantial benefit on him, the Court would naturally expect that such suspicion should be completely removed before the will is accepted as the last will and testament of the testator.

While Mr. Ramamurti Iyer for the defendant does not dispute these rules as well-settled in respect of wills, he argued that there is in this case hardly any question of propounding a will as the defendant's claim to the suit properties is solely rested on the settlement deed of Nainamalai. He submits that in such a case the rules of proof are not the same as applicable to wills, and refers us to the following observation of the Supreme Court in *Venkatachala Iyengar* v. *Thimmajamma*[3]:

> "However, there is one important feature which distinguishes a will from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded

1. (1838) 2 Moores P.C. 480
2. (1946) 2 M.L.J. 156 at 163.
3. (1959) S.C.J. 507 : A.I.R. 1959 S.C. 443.

before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator."

We think there is force in the contention that the rules of proof of wills and other documents cannot be the same as in the very nature of things a will differs in many respects from other documents of conveyance like a gift, settlement deed or a sale. In the case of the former the question always would arise after the death of the testator because the will takes effect as on his death unlike a conveyance which takes effect according to its tenor immediately or on a specified date. Of course, in the case of a will as well as a settlement deed, the person who relies on either will have to prove its execution, that is to say, that the executant signed the document and it was duly attested. But once that is done, we do not think that the person who relies on a settlement deed would be further called upon to show that the executant executed the document while he was in a sound and disposing state of mind. Where the fact is disputed, it is the party who asserts it, that will have to prove it. Where the execution is proved, it may well be taken for granted in the case of a conveyance or settlement deed that the executant knew its contents and was capable mentally and otherwise of making the disposition and understanding the same, unless the person asserting the contrary establishes his case. But when all these rules are stated, their significance, as we think, is confined to a stage where the evidence at a trial is so evenly balanced that it has necessarily to decide on the question of onus as to whether it has been discharged by the party on whom it lies. But where the effect of the entire evidence on record is assessed and the balance is entirely in one way, the importance of the onus recedes to the background.

We shall now direct our attention to the evidence in this case. It would be clear by now that the only question that we have to consider is whether on the evidence it can be held that the settlement deed was executed by Nainamalai while he was in a sound and disposing state of mind. The question whether the will was executed while the testator was in a sound and disposing state of mind is of secondary significance and has no direct bearing upon the defendant's claim based upon the settlement deed and the relevance of the will lies only in the fact that it will go to some extent in probabilising the naturalness of the provisions of the settlement. We shall, however, refer to the evidence in relation to the execution of the will. We have already briefly referred to its provisions. The will was executed and registered at Salem. It was attested by three persons of whom only D.W. 2 has been examined. The circumstances under which the will was executed have been recounted by the defendant himself in his evidence. At the time of the execution of the will the testator was 62 years of age. Accompanied by his grandson, the defendant, Nainamalai, went to Salem and consulted one Sri Andinayarana Chettiar, a practising lawyer. At the time of consultation there was none else. On instructions given by Nainamalai, the lawyer wrote the will. Peria Goundan (D.W. 2) and one Ramiash Goundan attested the will. Nainamalai himself presented the document for registration and one Guruswamy Mudaliar of Gurusamipalayam identified the testator at the registration. As to the mental condition of the testator the defendant would say that he was in a sound and disposing state of mind. According to his evidence it was not true that he was unable to walk, weak or was in any way unsteady of mind. The defendant is supported by D.W. 2, the attestor, so far as the actual execution of the will was concerned. As regards the execution of the settlement deed also the evidence of the defendant is much the same. He asserted that it was Nainamalai who gave instructions to the lawyer Sri Lakshmana Iyer at Salem to draft the settlement deed and that at the time of the execution of the settlement deed too he was in a sound and disposing estate of mind. The settlement deed has been attested by three witnesses including D.W. 4, a nephew of the defendant. The writer of the settlement deed also has given evidence. The former here again supported the defendant and stated that Nainamalai whom he had accompanied to the lawyer's house himself gave instructions to the lawyer and executed the settlement deed while in a sound and disposing state of mind. D.Ws. 1 and 4 denied that Nainamalai, at the time he executed the will or the settlement deed, was

suffering from any serious ailment which would affect his mental powers. The widow of Nainamalai in her evidence did not claim that he was at the time mentally weak or unable to understand what was what. All that she stated was that he was old and infirm, his eyes were watering, body paining and had headache. She also mentioned that before execution of the settlement deed he had been confined to bed for some time and was not moving about. A homeopathic physician (P.W. 5) was examined for the plaintiffs who was supposed to have treated Nainamalai. It is significant that this witness too never attributed any mental ailment to Nainamalai so as to deprive him of his faculties of discrimination and understanding of the nature of the dispositions he made under the will as well as the settlement. This physician merely mentioned that Nainamalai's eyes were watering and he had to be lifted. One of the daughters of Nainamalai, the 6th plaintiff, also gave evidence, but she too never stated that there was anything wrong with the mental capacity of Nainamalai. Surveying this evidence we have referred to as a whole, all that it amounts to is that Nainamalai was 62 years of age when he executed the will, and was about 69 when he executed the settlement deed and on neither occasion there was anything wrong with his mental capacity and that all he suffered from was old age, watering in the eyes, headache and bodily pain. We are therefore inclined to agree with the trial Judge that Nainamalai was in a sound and disposing state of mind both at the time he executed the will as well as the settlement.

We are not satisfied that Nainamalai had no reason to make a preference in favour of the defendant. The evidence clearly shows that from his birth the defendant was living with Nainamalai and his wife and, in fact, he was brought up by them and in later years he was of assistance to Nainamalai and his wife. He was also managing his properties. It may be that Nainamalai was affectionate towards his daughters and other grandchildren. But in view of the circumstances we have just now mentioned, it is probable that Nainamalai had greater affection and attachment to the defendant. Further when we look at the terms of the disposition, it is obvious that Nainamalai had not actually discriminated between his daughters and other grandchildren, and the defendant. He made provisions for all of them. The properties which Nainamalai bequeathed or settled in favour of the defendant consisted of four acres of garden land and two acres of punja. Whether they were worth Rs. 15,000 or Rs. 30,000 at material times, Nainamalai directed both under the will as well as the settlement payment to each daughter a sum of Rs. 1,500. That being the case, it seems to us that the criticism that Nainamalai discriminated between the defendant on the one hand, and the rest of the members of his family on the other cannot be accepted. It is true the two lawyers whom Nainamalai appears to have consulted at Salem have not been examined. It would have been better if they had been. As a matter of fact, Mr. Ramamurti Iyer conceded so much. But as contended by him, the omission to examine the lawyer makes no material difference to the conclusion that this Court has to arrive at. When the evidence on record is regarded as a whole, it does not appear to us that the failure to examine the lawyers in itself is of much consequence. We see that D.W. 4 is a nephew of the defendant and may be interested in him, and so too D.W. 3 may be interested in the defendant. But these two witnesses mainly speak about the execution of either the will or the settlement deed about which, as we said, there is no dispute. We are unable to accept the contention of Sri Gopalaswami Iyengar that there was no independent witness to prove the fact that Nainamalai was more attached to the defendant. The whole circumstances of the case show that beyond doubt. Even in the plaint it was admitted that the defendant was brought up by Nainamalai and his wife. The first plaintiff brought the defendant to her house according to the plaint and he stayed with her and her husband upto his death. In her evidence the first plaintiff further admitted that the defendant, while living with her and her husband, looked after the properties. Those circumstances would show that Nainamalai had reason to prefer the defendant. Some comment was made on behalf of the appellant that the will as well as the settlement deed were executed in secrecy and no one knew about them until Nainamalai died. But one has only to peruse the evidence of the first plaintiff, the widow of Nainamalai, to be convinced that far from there being any

secrecy, Nainamalai, before he left for Salem to execute the will, mentioned to her that he should give shares to his daughters as well as the defendant.

Even assuming, on account of the fact that the defendant took an active part in the execution of the settlement deed and obtained a substantial benefit under it, that suspicion is raised, that is entirely removed by the evidence on record read as a whole. We are, therefore, of the opinion that the trial Judge came to the correct conclusion as to the validity of the settlement deed and that it was executed by Nainamalai when he was in a sound and disposing state of mind and that it was not the result of undue influence, coercion or fraud on the part of the defendant.

The appeal fails and is dismissed with costs.

P.R.N. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. RAMAMURTI.

Ramachandra Chetty .. *Petitioner**

v.

C. Mothaliyandan Chettiar .. *Respondent.*

Limitation Act (IX of 1908), Article 168 (2)—Revision petition by tenant against order of eviction—Death of tenant during pendency of—Legal representatives not brought on record within time—Court unaware of death of petitioner dismissing revision petition on merits—Execution of decree for eviction—Starting point of limitation.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), sections 11 (4), 18, 26 and 35 (2) (a)—Order of eviction passed under section 7-A (4) of earlier Rent Control Act (XXV of 1949)—If can be executed after coming into force of new Act (XVIII of 1960)—Applicability of section 26 read with section 35 (2) (a) to pending revision petition against order of eviction passed under old Act—Eviction order against tenant—If can be executed against sub-tenant.

Where a Revision Petition was filed by a tenant against an order of eviction and during the pendency of the Revision Petition the tenant died and the legal representatives of the deceased tenant were not brought on record within 30 days time as required by law but nevertheless the Court, not being aware of the death of the tenant, later on dismissed the Revision Petition on merits and the landlord filed an execution petition to execute the decree for eviction :

Held, the three years period of limitation for executing the decree would commence to run only from the date when the Revision Petition was dismissed on merits and not from the date on which the 30 days time for bringing the legal representatives of the tenant on record expired.

An order of eviction passed under section 7-A (4) of the Madras Buildings (Lease and Rent Control) Act (XXV of 1949) which becomes executable under section 9 of that Act does not cease to be executable and enforceable after the coming into force of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) by reason of section 35 of the latter Act on the ground that an order under section 11 (4) of Madras Act XVIII of 1960 which corresponds to section 7-A (4) of the old Act is not executable under section 18 of Madras Act XVIII of 1960. If before Act XVIII of 1960 an order has become enforceable and executable by reason of the particular provision in section 9 read with section 7-A (4) of the old Act, it cannot cease to be an executable or enforceable order by reason of section 18 read with section 35 of Madras Act XVIII of 1960.

Section 26 read with section 35 (2) (a) of Madras Act XVIII of 1960 cannot apply to a situation in which an order for eviction had been passed by the Rent Controller and confirmed by the appellate authority under the earlier Rent Control Act of 1949 and a Revision Petition filed against that order to the High Court was pending when Madras Act XVIII of 1960 came into force. The acceptance of a contrary position would mean that in the Revision Petition the High Court will have to set aside the order of the Rent Controller and send the matter for fresh trial and investigation after giving an opportunity to the sub-tenant to resist the application even though the landlod has already made out his case and obtained an order for eviction, binding not only on the tenant but also on the sub-tenants under the then existing law. Section 26 must receive a limited application read with section 35 (2) (a) only where the scheme of the enactment can be carried out.

Further, it is settled law that if a decree is passed against the main tenant the order of eviction can straightway be enforced as against the sub-tenant: By enacting section 26 of the Madras Act of 1960 it was not the intention of the Legislature to make a deliberate departure from this settled and accepted position in law. Section 26 is merely intended to provide that if the sub-tenant is made a party the order passed in the proceedings will be binding upon him. It does not follow from this that if a sub-tenant is not made a party under section 26 the order of eviction obtained against the tenant would not be binding upon the sub-tenant and it cannot be enforced and executed against him.

* C.R.P. No. 953 of 1964. 8th March, 1965.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the City Civil Court at Madras VI Assistant Judge dated 8th April, 1964 and made in E.A. No. 99 of 1964 in E.P. No. 1244 of 1963 in H.R.C. No. 2768 of 1955.

N. C. Srinivasan, for Petitioner.

M. A. Srinivasan, and *M. S. Srinivasan*, for Respondent.

The Court made the following

ORDER.—This Revision Petition arises out of proceedings under the Madras Buildings (Lease and Rent Control) Act, 1960, though commenced under the old Act XXV of 1949. The landlord filed an application for eviction on the ground that the tenant was guilty of wilful default in the payment of rent and the Rent Controller passed an order for eviction on 3rd July, 1956. The tenant preferred an appeal and the appellate Court gave time for payment of rent till 22nd July, 1959, but as the tenant did not pay arrears of rent within the time fixed by the appellate Court, the appellate Court passed an order for eviction on 23rd July, 1959. The landlord filed a Revision Petition in the High Court feeling aggrieved by the order of the appellate authority granting time and giving indulgence to the tenant to pay the rent by 22nd July, 1959 as observed earlier ; the tenant had in his turn preferred a Revision Petition to this Court C.R.P. No. 1344 of 1959 against the order of eviction. During the pendency of C.R.P. No. 1344 of 1959 the tenant had obtained an order for stay of execution of the order of eviction. It appears that the tenant died somewhere about October, 1960 and the legal representatives were not brought on record within 30 days time as required under rule 32 of the Rules framed under the Act. On 31st August, 1962 the Revision Petition of the tenant C.R.P. No. 1344 of 1959 was dismissed on the representation that the tenant-petitioner was not anxious to prosecute the matter. The result was that on 31st August, 1962, there was a dismissal of the Revision Petition on the merits. At this stage it may be mentioned that the learned Counsel for the petitioner-tenant was not aware of the fact that the tenant had died and the legal representatives were not brought on record. Evidently he must have been instructed by some persons representing the tenant and learned Counsel must have proceeded on the footing that the tenant was still alive. The present execution petition E.P. No. 1244 of 1963 was filed by the landlord on 13th November, 1963, and is resisted by one Ramachandra Chetty who claims to be a sub-tenant alleging to have been inducted into the premises as early as 1943.

Learned Counsel for the petitioner first contended that the application for execution was barred by limitation on the ground that the three years time to execute the decree would commence to run even from November, 1960 after the expiry of one month from the date of death of the tenant in October, 1960. He urges that as soon as the one month period had expired after the death of the tenant without his legal representatives having been brought on record, the revision proceedings must be deemed to have terminated and limitation would commence from that date. I see no force in this contention. It is enough to refer to the statement of the law in Rustomji on Limitation, Sixth Edition at page 1046, where the learned author deals with the scope of Article 168 (2) which provides a fresh starting point of limitation for the execution of the decree calculated from the date of the final decree or order of the appellate Court passed on the appeal. Learned author has referred to the decision of the Privy Council in *Hussain Asghar* v. *Ramditta*[1], from which it is clear that even though an appeal has abated limitation would commence to run not from the time when the appeal abates by mere lapse of time for failure to bring on record the legal representatives, but only from the date when the Court passed the formal order dismissing the appeal after declaring the appeal as having abated. In this case the order which has been passed is one on the merits a dismissal of the Revision Petition. It may be that this order may not be binding on the legal representatives provided they take necessary proceedings to set aside that order on the ground that at that time the tenant was dead. But so long as that has not been

1. (1933) I.L.R. 60 Cal. 682.

done, the order has got to be regarded as a decision on the merits and limitation would commence to run only from 31st August, 1962.

Learned Counsel next contended that the proceedings though initiated under the old Act of 1949, must be regarded and dealt with as proceedings under the Act of 1960 by reason of the special provision contained in section 35 of the Act of 1960, hereinafter referred to as the Act. He urged that all orders passed under the old Act must be deemed to be orders passed under the corresponding provision of this Act (XVIII of 1960) and in the instant case the order for eviction was passed under section 7-A (4) of the old Act, which provided that if during the pendency of an application for eviction the tenant does not deposit the arrears of rent due by him up to that time, the Rent Controller or the Appellate Authority as the case may be shall stop all further proceedings and make an order directing the tenant to put the landlord in possession of the building. In this case from the record it is clear that such an order was passed by the Appellate Authority as the tenant did not deposit the rent as required by section 7-A (4) of the old Act with the result that under section 9 of the old Act, the landlord would be entitled to execute the decree for eviction. Learned Counsel urges that the order which was passed under section 7-A (4) of the old Act by reason of section 35 of the present Act must be deemed to be an order passed under section 11 (4) of the present Act. According to learned Counsel section 18 of the new Act which provides for execution of orders includes within its scope only orders made under sections 10, 12, 13, 14, 15, 16 and 17, and every order passed on appeal under section 23 or on revision under section 25. Section 18 does not take in an order passed under section 11 (4). I am not prepared to accept this interpretation of section 35 of the new Act which would result in absurd and anomalous results. If before Act XVIII of 1960 an order has become an enforceable and executable order, by reason of the particular provision in section 9 read with section 7-A (4) of the old Act, it cannot cease to be an executable or enforceable order by reason of section 35 of the Act; such an interpretation would result in this absurd consequence that an order for eviction obtained by the landord under the old Act of 1949 will become absolutely useless and the landlord will be obliged to commence fresh proceedings. I have no doubt whatsoever that the Legislature never intended that section 35 should have such an effect. In my opinion section 18 read with section 35 of the new Act would apply only in so far as may be applicable to the old proceedings. Learned Counsel lastly contended that the present petitioner who is a sub-tenant cannot be evicted from the premises as under section 26 of the present Act a sub-tenant should be impleaded in the proceedings for eviction. Here again learned Counsel relied upon section 35 (2) (*a*) and contended that all proceedings taken and commenced under the old Act must be deemed to be proceedings taken and conducted under the new Act with the result that the moment in a pending proceedings it is brought to the notice of the Court that a sub-tenant is in possession, the sub-tenant cannot be evicted unless he is made a party to the proceedings in question and an opportunity is given to him to resist the application for execution. The point raised is not free from difficulty. But on a careful consideration of all the aspects of the matter, I am inclined to take the view that having regard to the scheme of the Act, section 26 read with section 35 (2) (*a*) cannot apply to a situation in which an order for eviction had been passed by the Rent Controller and confirmed by the Appellate Authority and a Revision Petition is filed from that order. The acceptance of the contention of the learned Counsel for the petitioner would mean that in the Revision Petition this Court will have to set aside the order of the Rent Controller and the Appellate Authority and send the matter again to the Rent Controller, for fresh trial and investigation after giving an opportunity to the sub-tenant to resist the application even though the landlord has already made out his case and obtained an order for eviction, binding not only on the tenant but also on the sub-tenants under the then existing law. In my opinion section 26 must receive a limited application read with section 35 (2) (*a*) only where the scheme of the enactment can be carried out. In other words section 26 read section 35 would apply only in so far as they are applicable to a particular situation. But if it would involve a fresh trial reopening the entire

matter section 26 cannot possibly have application to such a situation. Even otherwise I am not inclined to agree with the learned Counsel for the petitioner that if the sub-tenant is not impleaded under section 26, the order for eviction cannot be executed against the sub-tenant. It is settled law that if a decree for eviction is passed against the main tenant, the order of eviction can be straightway enforced and executed as against the sub-tenant. I do not think that by enacting section 26 it was the intention of the Legislature to make deliberate departure from this settled and accepted position in law. In my opinion section 26 is merely intended to provide that if the sub-tenant is made a party the order passed in the proceedings will be binding upon him. It does not follow from this that if a sub-tenant is not made a party, the order of eviction obtained against the main tenant would not be binding upon the subt-tenant. In a recent judgment in C.R.P. No. 494 of 1964 I had occasion to consider how far an order for eviction obtained against a tenant can be straightway enforced and executed against the sub-tenant. The principle of the decision clearly applies to the instant case. It is sufficient to refer to the recent decision of the Supreme Court in *Rupchand* v. *Raghuvanshi (P.), Ltd.*[1] in which the Supreme Court state the law thus :

> "Where the landlord instituted a suit against the lessee for possession of the land on the basis of a valid notice to quit served on the lessee and does not implead the sub-lessee as a party to the suit the object of the landlord is to eject the sub-lessee from the land in execution of the decree and such an object is quite legitimate. The decree in such a suit would bind the sub-lessee. This may act harshly on the sub-lessee ; but this is a position well understood by him when he took the sub-lease. The law allows this and so the omission cannot be said to be an improper act."

I may also refer to the Bench decision of the Calcutta High Court in *Sailandra Nath* v. *Bijan Lal*[2] and *Yusuf* v. *Jyotischandra Banerji*[3] which contain a discussion of the legal principles regarding the array of parties in a proceeding for ejectment instituted by the landlord against his tenant, when the tenant has created a sub-lease. I am therefore of opinion that section 26 of the present Act of 1960 does not help the contention of the petitioner.

For all these reasons, I dismiss the Revision Petition with costs. The petitioner is given three months time to vacate.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

State of Madras represented by the Commissioner of Agricultural Income-tax, Board of Revenue, Madras-5 .. *Petitioner**

v.

Smt. Pattammal *alias* Lakshmi Ammal and others .. *Respondents.*

Madras Agricultural Income-tax Act (*V of* 1955), *sections* 2 (q), *and* 3 (3)—*Association of individuals—Settler settling different extents of land on different persons—Cultivation through common agents even after such settlement—But income of each beneficiary shown separately in appropriate account—Settlees if can be assessed as an "association of individuals."*

For the relevant assessment years the Agricultural Income-tax Officer assessed five persons who were the beneficiaries under five distinct settlement deeds as having formed an association of individuals. The Assistant Commissioner of Agricultural Income-tax on appeal confirmed the order. On further appeal the Agricultural Income-tax Appellate Tribunal found, on an examination of the documentary evidence, that there was nothing to show that settlement deeds were not genuine or that they have not been acted upon and that the trust enured to the beneficiaries inescapably. In the view of the Tribunal there was nothing to show that the settlees engaged themselves in a joint enterprise for the purpose of producing income from the lands. The Tribunal also observed that there could not be any inference about an association of individuals through the mere fact of common management. On these facts the Tribunal held that there was no association of individuals and set aside the assessment orders. On Revision filed against the order of the Tribunal.

1. A.I.R. 1964 S.C. 1889.
2. A.I.R. 1945 Cal. 233.
3. (1912) 39 Cal. 739.

* T.C. Nos. 114, 115 and 116 of 1963. 2nd September, 1964.

Held, the finding arrived at by the Tribunal is adequate for the conclusion that the several deeds of settlement were acted upon and that the income of each beneficiary was shown separately in the appropriate account. In the circumstances of the case, the Tribunal was right in holding that there was no association of individuals chargeable to tax as such. The fact that the settlees, who were absentee-landlords, had two common agents to look after their lands did not make any difference to their getting from their own lands the appropriate income due in respect of those lands. The fact that different owners of properties, who are absentee-landlords, for their own convenience secured the help of two residents in the village for looking after their lands and cultivating them would not *ipso facto* constitute them as an association of individuals within the special meaning given to that term for the purposes of assessment under the Agricultural Income-tax Act.

Petitions under section 54 (1) of the Madras Agricultural Income-tax Act, praying the High Court to revise the order of the Court of the Agricultural Income-tax Appellate Tribunal, Madras, dated 12th June, 1962 and made in A.T.A. Nos. 24, 25 and 26 of 1962 (Appeal Nos. 134, 135 and 136 of 1961 dated 16th December, 1961) relating to the assessment years 1958-59, 1959-60, and 1960-61, Assistant Commissioner of Agricultural Income-tax, Thanjavur, Gi-R. No. P. 46, 58-59 dated 24th August, 1962, Gi-R. No. P. 46/59-60 dated 26th August, 1962 and Gi-R. No. P. 46/58-59 dated 24th August, 1961 on the file of the Agricultural Income-tax Officer, Kumbakonam.

G. Ramanujan, for Government Pleader, for Petitioner.

S. Swaminathan and *K. Ramagopal*, for Respondents.

The Judgment of the Court was delivered by

Ramakrishnan, J.—These Revision Cases are filed by the State against the decision of the Agricultural Income-tax Appellate Tribunal in Appeals Nos. 24, 25 and 26 of 1962. The Revision Cases arise in the following circumstances. For each of the three years of assessment 1958-59, 1959-60 and 1960-61 the Agricultural Income-tax Officer, Kumbakonam, assessed five persons who were the beneficiaries under five distinct settlement deeds, as having formed an association of individuals within the meaning of section 2 (*q*) read with the charging section 3 of the Madras Agricultural Income-tax Act, 1955. The Assistant Commissioner of Agricultural Income-tax on appeal confirmed the order of the Assessing Officer, and on further appeal to the Agricultural Income-tax Appellate Tribunal, the Tribunal held that there was no association of individuals, in the circumstances of the case, and set aside the assessment order on the basis of that finding. The State has filed these Revision Cases against the orders of the Tribunal.

The facts of the case are briefly the following : One Pattammal who appears to have been a lady owning extensive properties, executed five settlement deeds between 25th October, 1954 and 17th March, 1955, settling different extents of properties on five different persons in the following manner :

Date on which the properties were transferred to others by documents.	*Nature of transfer.*
1. 25—10—1954	A 'Marriage Settlement Trust' in favour of her first grand-daughter R. Kanaka appointing one B. R. Srinivasan Iyengar, brother-in-law, of N.T. Raghunathachariar as Trustee — Ac. cent. Land in Ammangudi village ..25—19 Land in Subbayyansothi village...25—71 Total ..50—90
2. 25—10—1954	A 'Marriage Settlement Trust' in favour of second grand-daughter R. Hemalatha with her mother Smt. Padmavathi Ammal (2nd Petitioner here) as trustee. Land in Ammangudi village ..25—16 Lands in Subbayyansothi village. 25—39 Total ..50—55

Date on which the properties were transferred to others by documents.	*Nature of transfer.*
3. 25—10—1954	A 'Marriage Settlement Trust' in favour of her third grand-daughter R. Indira appointing the father Sri. N. T. Raghunathachariar (third petitioner) as trustee. Ac. cent. Lands in Ammangudi village ..25—18 Lands in Subbayyansothi village..24—33 Total ..49—51
4. 17—3—1955	A 'Stridhana Gift' to her married daughter R. Padmavalli Lands in Ammangudi village ..12—34 Lands in Subbayyansothi village. 17—74 Total ..30—08
5. 17—3—1955	Gift in favour of her brother's son Sri N. T. Ramanujam Iyengar (seventh Respondent here) Lands in Ammangudi village .. 2—35 Lands in Subbayyansothi village. 22—50 Total ..24—85

When the matter came up before the Assistant Commissioner of Agricultural Income-tax, he noticed that even after the settlement under the gifts referred to all the lands continued to be managed and cultivated as usual with the same agents by Pattammal, some lands under pannai cultivation and some on waram. The waram was received in common from all the lands ; and the income was pooled together and brought to common day book and ledger. According to the Assistant Commissioner of Agricultural Income-tax, it was not possible to find out from the accounts, the income from the lands given to each minor grand-daughter or others. All the income arising as per the account books (of the agents) was deposited in the Urban Co-operative Central Bank at Kumbakonam in the joint names of Pattammal and N. T. Raghunathachariar who operated jointly and severally on the bank. The Assistant Commissioner found that there was nothing in the accounts to show that the profits were ever distributed to the daughter (one of the settlees) or to the trustees for the three grand-daughters or deposited in the books in the names of trustees on behalf of the minors. From these circumstances, the Assessing Officer as well as the Assistant Commissioner of Agricultural Income-tax came to the conclusion that the several settlees under the five documents were liable to be assessed as an association of individuals on their agricultural income.

The Tribunal observed after perusal of the original documents, that the settlor had undertaken the responsibility for the grand-daughter's marriage and to facilitate the same had made the settlement to augment the resources with which the marriage could be performed for the grand-daughters with suitable bridegrooms. In the opinion of the Tribunal, there was nothing to show that the documents were not genuine or that they had not been acted upon, for the appellants (respondents here) had produced the account-books showing their paddy and expenses separately

debited for the account years 1954-55 to 1961-62 for R. Kanaka, R. Hemalatha and R. Indira. They had produced the account-books showing the receipt of paddy and expenses separately for the account-years 1955-56 to 1960-61 for Padma and N. T. Ramanujam. They had also filed statements showing the receipts of each beneficiary and the appropriation of expenses. In the view of the Tribunal, all these could not be ignored for they furnished evidence about the documents having been acted upon. The Tribunal also observed that there could not be any inference about an association of individuals, through the mere fact of common management. The documentary evidence showed that the documents had been acted upon and that the trust enured to the beneficiaries inescapably and there was nothing to show that the respondents engaged themselves in a joint enterprise for the purpose of producing income from the lands.

The finding arrived at by the Tribunal as stated above, on an examination of the evidence in the case, is adequate for the conclusion that the several deeds of settlement were acted upon, and that the income of each beneficiary was shown separately in the appropriate account. However there was an observation that the income from all the properties at a particular stage, was deposited in Kumbakonam Bank to the credit of the settlor as well as her son-in-law Raghunathachariar, and since we had a doubt about this aspect of the case, we permitted the respondents to file an affidavit explaining the circumstances under which such a deposit was made. A copy of the affidavit was supplied to the learned Government Pleader. From this affidavit it would appear that there were two persons by name Narayan Iyengar and Srinivasagopalachari who were residents of the villages, and who looked after the lands of the different settlees after making their own arrangement either for pannai cultivation or cultivation by lessees on waram. But these agents took care to show the income from such settlee's lands separately. The settlees were absentee landlords and did not care to leave large sums of money in the possession of the above two agents in the village. Where the paddy was sold an account was opened in the Kumbakonam Co-operative Urban Bank in the joint names of Pattammal and her son-in-law and the amounts were immediately deposited there. But the amount so deposited was duly remitted to the different beneficiaries at the earliest opportunity. Thus the amount due to Ramanujam, one of the settlees, who is the brother's son of Pattammal and brother of Raghunathachari was sent by bank draft to his address. The amounts due to the minor grand-daughters of Pattammal represented by their father and mother as trustees were remitted to a separate account opened in the joint names of Pattammal's daughter and her son-in-law in the Indian Bank. The affidavit proceeds to state that for the amounts thus due to the minor grand-daughters National Savings Certificates had been purchased. This statement in the affidavit is in accord with the finding of the Tribunal, that the different settlement deeds were fully acted upon and the fact that the settlees had two common agents to look after the lands in the village (they being absentee landlords) did not make any difference to their getting from their own lands the appropriate income due in respect of these lands. The fact that different owners of properties, who are absentee landlords, for their own convenience secured the help of two residents in the village for looking after their lands and cultivating them would not *ipso facto* constitute them as an association of individuals within the special meaning given to that term for the purposes of assessment under the Agricultural Income-tax Act. This aspect of the matter was considered by us recently in *The State of Madras v. Subramania Iyer*[1]. There we observed :—

"It is a common experience in this part of the country, where the system of absentee landlords prevails, and that different owners of agricultural lands give them for cultivation to one lessee or manager or agent, the lessee or manager or agent, thereafter, for the purpose of his convenience, uses the same set of ploughs and bulls and common pannai servants for cultivation, and after collecting the produce he apportions it among the different owners in proportion to the yields from their lands. There is no scope for construing such owners as having formed an associa-

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1. Since reported in (1965) 1 M.L.J. 566 : (1965) 1 I.T.J. 698.

tion solely by reason of their having engaged one and the same lessee, or manager or agent for the purpose of cultivation. The fact that, in the present case, the different owners of the land, formed members of one family or acquired their properties by settlement or partition from one person could not by itself lead to any alteration to this principle. Even in such a case it is necessary to prove the essential requirements, *viz.*, that as between themselves they had associated together and decided upon the common exploitation of their lands for common benefit and that it was only in pursuance of that agreement a single person was selected to carry out the common purpose of joint cultivation. This essential requirement is absent in this case."

The same principles apply to these cases and we therefore hold that the view of the Tribunal is right. The Revision Cases are dismissed. No order as to costs.

V.S. *Revision Cases dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

D. Appavu Pillai, Proprietor, K. Ratna Motor Service, Dharmapuri .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (*XI of* 1922), *sections* 10 (2) (vii), 13—*Obsolescence allowance—Assessee, a bus operator—No day-book or ledger maintained—Buses Valuation Book kept—Value of buses noted—Writing off value of condemned buses—Whether written off in the books—Return of income made on estimate basis—Claim for allowance—Rejection on the ground of non-maintenance of day-book and ledgers—Not justifiable.*

The assessee, a bus operator, claimed obsolescence allowance in respect of his condemned vehicles. The written-down value of these buses was claimed as a permissible allowance under section 10 (2) (vii) of the Income tax Act, as their scrap value were nil. The assessee did not maintain any day-book and ledger but only a Buses Valuation Book, in which the value of the vehicles was noted and an entry was made in respect of the condemned vehicles wiping out the relevant entry in this account. The return of income from buses was made by the assessee only on an estimated basis. The Income-tax Officer while estimating the income, allowed the obsolescence claim by estimating the scrap value at 25% of the written-down value. This allowance was withdrawn by the Appellate Assistant Commissioner in appeal and the same was confirmed by the Tribunal on the ground that the mandatory requirement under the First Proviso to section 10 (2) (vii) as to writing off these sums had not been done since the assessee had not maintained any day-book and ledger. On a Reference under section 66 (1)

Held, the allowance is permissible in the circumstances.

The Income-tax law does not specify that any particular set of accounts should be maintained by the assessee. The expression "method of accounting" obviously includes the manner in which the assessee displays the activities of his business in such books of accounts as he maintains. If it appears that the complement of such books of account is not complete enough to enable the proper assessment of the income of the assessee then it is open to the Officer to arrive at the income on the basis of estimate as provided under section 13.

The expression "books of the assessee" in the context in which it appears in section 10 (2) (vii) cannot give any indication of the particular type of accounts which the assessee should maintain. That the accounts maintained by the assessee are defective, has nothing to do with the allowance that can be granted under the section. If the assessee had accounts in which the relevant entry with regard to this allowance appeared, it would be sufficient compliance with the First Proviso to the section.

The profits and loss account cannot be said to be a book of account. It is only a statement representing the state of the business as at the end of the accounting year and the details contained in the settlement are culled out from such other books of account which may be called primary books which a businessman generally maintains. The lack of preparation of a profit and loss account cannot entail the rejection of the allowance under the section.

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* T.C. No. 10 of 1962. 17th March, 1965.

Case referred to the High Court by the Income-tax Appellate Tribunal, under section 66(1) of the Indian Income-tax, Act, 1922 (XI of 1922), in R.A. Nos. 1320, 1342 of 1960-61 (I.T.A. Nos. 2784, 2785 and 2786 of 1960-61: Assessment years 1949-50, 1950-51 and 1951-52).

K. Narayanaswamy and *K. Mahadevan*, for Applicant.

V. Balasubrahmanyam, Special Counsel for Income-tax, on behalf of Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—One of the allowances which has to be taken into account in the computation of the profits and gains of a business is what is termed obsolescence allowance. Section 10 (2) (vii) of the Income-tax Act specifies this allowance and the conditions under which it can be granted are in these terms :

> "In respect of any such building, machinery or plant which has been sold or discarded or demolished or destroyed, the amount by which the written-down value thereof exceeds the amount for which the building, machinery or plant, as the case may be, is actually sold, or its scrap value; provided that such amount is actually written-off in the books of the assessee."

The assessee in this case was operating a bus transport business as sole proprietor from the 1st of April, 1948. For the periods ending with the 31st of March, 1949, 31st of March, 1950, and 31st of March, 1951, relevant to the assessment years 1949-50, 1950-51 and 1951-52, the assessee claimed this allowance, the sums in question being Rs. 14,927, Rs. 3,363 and Rs. 4,309. It is stated that in these account years, five, three and five buses respectively were condemned, their scrap value being nil; according to the assessee, the written-down value of these vehicles during the years was claimed as the allowance under this head. The Income-tax Officer, however estimated the scrap value at 25% per cent. of the written-down value and allowed Rs. 7,233, Rs. 1,488, and Rs. 3,231 during these years. The assessee appealed. What precisely were the grounds advanced by him in the appeals is not clear. But, in the statement of the case, the Tribunal records that the assessee did not press any of these appeals. But the Appellate Assistant Commissioner took the view that the allowance granted under section 10 (2) (vii) was improper and he accordingly directed the adding back of the allowance to the income. There were further appeals to the Tribunal in which the legality of the action of Appellate Authority in withdrawing the obsolescence allowance was questioned. The Tribunal held that in order to qualify for this allowance, it was mandatory that the sum in question should have been written-off in the books of the assessee. The Tribunal was of the view that this requirement contained in the proviso to section 10 (2) (vii) was intended by the Legislature to restrict the relief only to cases where an assessee maintains regular books of account. The Tribunal thought that as the assessee never kept any accounts and his income having been returned on the basis of his own estimates, the allowance was rightly refused.

It is in these circumstances that the question :

> "Whether the disallowance of the obsolescence allowance for the assessment years 1949-50, 1950-51 and 1951-52 is justified?"

stands referred to us.

It does not appear to be disputed as a question of fact that certain vehicles were in fact condemned as useless during the relevant account years. During the assessment proceedings, the assessee produced before the Income-tax Officer "Daily collections and expenditure book, Conductors' challans, Trip sheets, Tyre consumption, stock book and other subsidiary books and vouchers for purchases and expenditure." The assessee also explained to the Income-tax Officer that he submitted his return by estimating the income at a flat rate per bus for the reason that a regular day-book and ledger had not been maintained. The Income-tax Officer accordingly had to compute the income on an estimated basis by invoking the proviso to section 13. Notwithstanding the absence of a day-book and a ledger, the Income-tax Officer was satisfied that the obsolescence allowance claimed could be granted. When the matter came before the Appellate Assistant Commissioner, that authority took the

view that the loss under section 10 (2) (vii) could be allowed only if such amount is actually written-off in the books of the assessee. He proceeded to hold that the assessee did not maintain any regular books of account and although some subsidiary records were produced, no cash book or ledger had been maintained and hence the assessee had not written-off such losses in the books of account. This view was accepted by the Tribunal, notwithstanding the fact that the assessee produced before all the authorities an account called the "Buses Valuation Books" in which the value of the vehicles, that is to say, their written-down value as at the commencement of the year, had been recorded and an entry had been made writing in the amount of allowance under section 10 (2) (vii). The Tribunal observed that the term "books" in section 10 (2) (vii) must necessarily refer to the books of account maintained in the course of the business and concluded by saying that this was a case where the assessee never kept any account and his income was being returned on an estimated basis.

We are unable to agree that this is a case where for lack of compliance with the requirements of the first proviso to section 10 (2) (vii) the assessee's claim to obsolescence allowance can be denied. It is not in dispute that the assessee did maintain a set of accounts. He had no doubt omitted to maintain a day-book and a ledger. It is true that these are important accounts in the conduct of a business. But, would it be correct to say that the assessee maintained no books of account at all, or what is more important, that the amount in question had not been written-off in such books of accounts he found it necessary and sufficient to maintain? It has been admitted by all the authorities that the assessee did maintain what he called the "Buses Valuation Book" in which the value of the vehicles was recorded and an entry had been made in respect of these condemned vehicles wiping out the relevant entry in this account. The Income-tax law does not specify that any particular set of accounts should be maintained by an assessee. Section 13 of the Act, which deals with the method of accounting, is the only provision which can give any clue in this regard. This provision required that the income, profits and gains shall be computed in accordance with the method of accounting regularly employed by the assessee. But, where no such method of accounting has been regularly employed, or the method employed is such that the income, profits and gains cannot properly be deducted therefrom then it is open to the Income-tax Officer to make the computation upon such basis as he may determine. The expression "method of accounting" obviously includes the manner in which the assessee displays the activities of his business by entries in such books of account as he maintains. If it appears that the complement of such books of account is not complete enough to enable the proper assessment of the income of the assessee, then it is open to the Income-tax Officer to arrive at the income on the basis of an estimate, or adopting such other methods either with or without reference to the books of account available, as he may determine to be suitable in the circumstances of the case. The section does not, however, say, nor is there any provision in the Act that an assessee carrying on a business shall maintain a specified set of accounts. The expression "books of the assessee" in the context in which it appears in section 10 (2) (vii) cannot give any indication of the particular type of accounts which the assessee should maintain. That the accounts maintained by the assessee are defective, in the sense that they do not lead to a correct assessment, has nothing whatever to do with the allowance that can be granted under section 10 (2) (vii). If the assessee has accounts in which the relevant entry with regard to this allowance appears, it would seem to be a sufficient compliance with the first proviso to section 10 (2) (vii). Both the Appellate Assistant Commissioner and the Tribunal seem to have looked upon this proviso as a condition in the nature of a penalty. the failure to comply with which deprives the assessee of this allowance. We are unable to agree with this view.

It is contended by Mr. V. Balasubrahmanyam, learned Counsel for the Department, that according to general mercantile practice, the writing-off can be done only in the profit and loss account, for this allowance represents a loss which goes to reduce the profit. In this case, there is no profit and loss account at all and it is

therefore suggested that the writing-off that is contemplated in the proviso cannot have been effected. Our attention has been drawn to " Accountancy " by William Pickles, where, at page 74, dealing with" Depreciation ", the learned author observes thus :

" The wearing out of a machine is a simple and obvious example, but it must be emphasised that this is but one of many causes. As with all other entries, there must be complete double entry for the depreciation adjustment. The required entry is : Debit trading and Profit and Loss account and Credit the asset. in respect of which depreciation is being recorded. This entry conforms with the principles already enunciated in that the debit to trading and profit and loss account is necessary because the amount written-off represents an expense and the credit to the asset is required as the asset has *pro tanto*, been reduced in value...."

This statement found in this text only explains the manner in which depreciation should figure in the accounts maintained on the double entry system. But it does not lay down any inviolable principle. If accounts are maintained on the double entry system, the author explains how it should be done. Nor are we able to agree with the learned Counsel for the Department that the profit and loss account is an account which can be said to be a book of account. It is only a statement representing the state of business as at the end of the accounting year and the details contained in the statement are culled out from such other books of account which may be called primary books which a businessman generally maintains. It does not appear to us that this argument, that for lack of preparation of a profit and loss account the allowance should be refused, can be accepted.

We are satisfied that the Tribunal misconstrued the scope of section 10 (2) (vii). It follows that the assessee would be entitled to the allowance as granted by the Income-tax Officer. The question is answered accordingly.

In view however of the fact that this Reference was rendered necessary through the shortcomings of the assessee's own method of maintaining accounts, we do not see fit to award him any costs.

V.S. ——— *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Amalgamated Commercial Traders (Private), Ltd. .. *Petitioner**

v.

A.C.K. Krishnaswami .. *Respondent.*

Practice—Civil suit by a company against its directors and also winding up petition—Company if when and how entitled to inspection and copies of documents filed by one of the directors in Reference Proceedings under section 66 of the Income-tax Act (XI of 1922), in respect of his own assessment.

The Company, the petitioner herein, had filed a suit in the Original Side of the High Court against certain directors of the company for the recovery of a sum of money being the surrender value of a mining lease, wrongly appropriated by the directors to their own private account. Those directors had filed a petition for winding up of the company. T.C.No. 218 of 1959 was an Income-tax Reference Case in regard to the directors as assessees and in that proceedings it had been held that the directors were the beneficial owners of the lease. The petition was filed by the Company seeking leave to inspect and get copies relating to the Reference proceedings for the purpose of the suit and winding up petition. It was contended in Court that the inspection and copies were required for the purpose of getting a review of the order made in the Reference proceedings.

Held, on the materials available it cannot be stated that the Court in the judgment in the Reference Case relied on any particular document for coming to the conclusion that the directors were the beneficial owners of the lease. The petitioner therefore is not entitled to inspection and copies of those documents.

The question as to the admissibility of the documents in question in view of section 54 of the Income-tax Act of 1922 and section 137 of the Act of 1961 and the effect of repeal of section 137 by the Finance Act of 1964 was not considered to be necessary.

If the petitioner requires the documents for the purpose of his defence in the company winding up petition or in the original suit it will be appropriate for him to take the necessary steps in those proceedings.

* C.M.P. No. 39 of 1965 in T.C. No. 218 of 1959. (Ref. No. 82 of 1959). 21st June, 1965.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant leave to the petitioner herein to inspect the proceedings in T. C. No. 218 of 1959 and grant copies of the same to the petitioner for the purpose of their defence in Comp. P. No. 87 of 1964 and for prosecuting C. S. No. 65 of 1964.

G. Vasanthapai and *D. Padmanaba Pai*, for Petitioner.

G. Ramaswami for *V. Srinivasan*, for Respondent.

V. Balasubramaniam, Special Counsel, for Income-tax.

The Court made the following

ORDER.—This petition is filed by a Director of Amalgamated Commercial Traders (P.) Ltd., for leave to inspect the documents relating to proceedings in T.C. No. 218 of 1959, and for grant of the copies of documents for the purpose of their defence in Company Petition No. 87 of 1964 and for prosecuting C.S. No. 65 of 1964.

The Company, Amalgamated Commercial Traders Private Ltd., filed a suit C.S. No. 65 of 1964 against A.C.K. Krishnaswami, Hariprasad, Smt. Godavari Bhai and Factors (P.) Ltd. In this suit the company, amongst other reliefs, prayed for a decree against defendants 1 and 2 jointly and severally for a sum of Rs. 2,25,000 with interest at 6% per annum from the date of suit. The contention of the plaintiff Company is that the first defendant received a sum of Rs. 3,15,000 as and for the surrender value of a lease, and appropriated the proceeds which properly belonged to the Company. The suit is resisted by the defendants and is pending before the Original Side of this Court. Defendants 2 and 3 in the suit filed Comp.P. No. 87 of 1964 for winding up of the Company, Amalgamated Commercial Traders Private Ltd. In that application they have referred to T.C. No. 218 of 1959 on the file of this Court for the purpose of negativing the right of the Company to the magnesite Lease. The portion of the judgment extracted in the affidavit is as follows :—

"We are further satisfied that, though the Amalgamated Commercial Traders (Private) Limited was the formal lessee on record from the inception of these transactions it must have been understood quite clearly between the assessee and the Amalgamated Commercial Traders (Private) Limited that the beneficial interest in the lease should belong to the assessee .... We have endeavoured to show and we find it satisfactorily established that notwithstanding that the lease stood nominally in the name of the Amalgamated Commercial Traders (Private) Limited the true beneficiary was the assessee himself ...."

In this petition it is contended on behalf of the company that the company was not a party to the Reference Application, T. C. No. 218 of 1959, and that the finding of the Bench in its absence that A. C. K. Krishnaswami is the real owner is not binding on it, and that as the decision affected the Company adversely it was desirous of seeking its remedy against the judgment by appropriate proceedings. Though in the petition it was stated that inspection and copies of the documents were required for the defence in Comp. P. No. 87 of 1964 and for prosecuting the suit, C.S. No. 65 of 1964, it was contended in this Court that the Company was contemplating relief against the judgment by review or by an appeal to the Supreme Court and therefore inspection and grant of certified copies of documents was necessary.

This petition is strongly opposed by the first respondent A. C. K. Krishnaswami, on the ground that the application is not *bona fide*, and that the intention of the petitioner was to have a roving inspection into his documents for ulterior purposes, and that if any document was required for the purpose of prosecuting Comp. P. No. 87 of 1964 or C. S. No. 65 of 1964 the Company might have taken steps to obtain the documents in those proceedings.

If the petitioner contemplated a review or appeal to the Supreme Court he might have taken appropriate steps and then asked for relief, and this petition for inspection and copies of the documents in contemplation of the filing of the review petition or an appeal to the Supreme Court should not be entertained. It was also contended that the documents were in the nature of confidential documents as they related to income-tax proceedings and therefore copies should not be granted.

It is clear from the affidavits filed by the parties that the relationship between the parties is very strained. Several allegations made in the affidavits may not be quite relevant for deciding the question whether the inspection of the documents should be allowed and copies of the same should be granted to it and therefore it is unnecessary to refer to these allegations.

If the petitioner requires the documents for the purpose of his defence in the Company petition or in the original suit it will be appropriate for him to take the necessary steps in those proceedings. So also if the petitioner seeks to have the judgment in T.C. No. 218 of 1959 reviewed or seeks to prefer an appeal before the Supreme Court, he may after filing the review petition or the appeal pray for and obtain relief from either this Court or the Supreme Court. In this petition all that has to be considered is whether for the purpose of enabling the petitioner to file the contemplated review petition or appeal, inspection of the documents should be allowed and copies thereof furnished to it. When this petition came up for hearing on 20th April, 1965, the petitioner was permitted to have an inspection of the judgment of this Court in T.C. No. 218 of 1959. The petitioner's Counsel was also permitted to note the particulars of the documents referred to in the judgment and if he felt that certain documents have not been properly construed and that he should have inspection of the documents he was directed to furnish a list of such documents with the reasons why he wanted inspection of those documents. This direction was given to enable the petitioner to convince this Court *prima facie* that certain documents had to be inspected. In pursuance of the order of this Court the petitioner perused the judgment in T.C. No. 218 of 1959, and filed a further affidavit on 23rd April, 1965. The petitioner has not made reference to specific documents or given reasons why the documents should be inspected by him but generally stated that it appeared to him that the High Court was not appraised of all the circumstances of the transactions and therefore it was just and necessary that inspection should be granted regarding the documents referred to in paragraph 6 of the affidavit. In paragraph 6 of the affidavit he has prayed for inspection of records and proceedings in T.C. No. 218 of 1959 on the file of this Court from the time of the Reference from the Income-tax Appellate Tribunal till its disposal, and for grant of copies of typed papers and documents refered to at the time of the hearing in T.C. No. 218 of 1959. Copies of the orders of the Tribunal and relevant portions of the order of the Appellate Assistant Commissioner and the Income-tax Officer's order were also sought for. In effect the petitioner has asked for inspection of all the documents and for certified copies of the documents.

As was pointed out at the outset in this petition, this Court is concerned only with making available material that may be necessary for the petitioner to prefer a review petition. It is only if and when a review petition is filed, the Court that decided T.C. No. 218 of 1959 may be in a position to find on which documents the Court rested its conclusion that the lease was in favour of A. C. K. Krishnaswami and not the Company, and direct inspection of those documents and for furnishing copies of the documents.

At this stage unless it is shown that the conclusion was arrived at by the Bench by relying on certain documents and that those documents should be inspected, it will not be proper to grant the request of the petitioner. In this connection it is necessary to note that if the petitioner wants the documents for the defence in the suit he can obtain them in proceedings in the suit. The petitioner was not a party in T.C. No. 218 of 1959 and therefore the decision of the Bench in the Income-tax Reference will not be binding on the petitioner. So the only purpose in preferring the review petition or an appeal is for correcting what according to the petitioner is an erroneous conclusion. The petitioner has not stated that the Bench has relied on any particular document, and that he should be permitted to have inspection of that document. For the purpose of finding out whether the Bench has relied on any particular document for coming to the conclusion that the lease was in fact in favour of A. C. K. Krishnaswami, I referred to the judgment of the Bench in T.C. No. 218 of 1959. In paragraph 22 a reference is made to the Appellate Judgment of the Tribunal. But that reference is only for the purpose of coming to the conclusion that

the assessee was well qualified to start an undertaking of the kind in which he engaged himself. Again in paragraph 25 the order of the Tribunal is referred to for the purpose of dissenting from the view of the Appellate Tribunal that the assessee had no real intention of carrying on the business. In paragraph 34 another passage in the order of the Tribunal is referred to and in paragraph 35, page 70 of the typed papers is referred to. But these references are not relied upon for the purpose of deciding the question whether A. C. K. Krishnaswami is the person for whose benefit the lease was taken.

Again in paragraph 37 reference is made to the absence of separate private accounts of the assessee. It is further stated that the assessee produced before the Tribunal his cheque books to show that some of the payments for the maintenance of the mines and for the running of the Salem Office were made directly by him. The Bench proceeds to observe that these entries do find a place in the books of the Company itself. In this connection it may be stated that the petitioner is in possession of all the account books of the Amalgamated Commercial Traders (Private) Ltd. From a mere reference to certain cheque books produced by A. C. K. Krishnaswami in the Income-tax proceedings it cannot be contended that the company is entitled to inspection of all the cheque books of A. C. K. Krishnaswami. The petitioner may rely on the company's accounts in the original suit, O.S. No. 65 of 1964, or in the Company Petition No. 87 of 1964 or in the review petition and convince the Court that the Company was the real lessee, and not A. C. K. Krishnaswami. But on the materials available, it cannot be stated that the Bench relied on a particular document for coming to its conclusion and therefore the petitioner is entitled to inspection and copies of those documents. The Office was directed to furnish a certified copy of the judgment to the petitioner. It is upto the petitioner to file a review petition or an appeal and convince the concerned Court that he is entitled to inspection and copies of the documents. But at this stage I am not convinced that for the purpose of the contemplated review or the appeal the petitioner is entitled to inspection of the documents or for having copies thereof. On this ground this petition is dismissed.

As copies of documents which were filed in Income-tax proceedings were prayed for, notice was ordered to the Income-tax Counsel. Mr. Balasubramaniam, the learned Counsel, appeared on behalf of the Department. He submitted that the High Court exercising powers under section 66 of the Income-tax Act is not an appellate Court and was only exercising special jurisdiction which is different from a civil Court, and that the function of the High Court was one purely advisory in nature. He also submitted that the Income-tax proceedings are not civil proceedings, but were revenue proceedings, to which neither Civil Rules of Practice nor the Appellate Side Rules would apply, and that the rules made by the High Court for inspection of documents and grant of copies thereof in the exercise of its civil jurisdiction are not applicable to Income-tax proceedings. He pointed out that while section 66 (A) (3) of the Income-tax Act made the Civil Procedure Code applicable to Income-tax proceedings before the Supreme Court, no similar provision is made regarding proceedings before the High Court. He further submitted that there was an express provision under section 54 of the Income-tax Act of 1922, which treated the documents produced in an Income-tax enquiry as confidential and prohibited Courts from divulging any of the materials. Section 54 of the Income-tax Act, 1922, was repealed by the Act of 1961 and re-enacted as section 137. Section 137 of the Act of 1961 was repealed by the Finance Act of 1964. As the Act stands at present the documents are not treated as confidential but the learned Counsel would contend that by application of section 6, clause (*c*) of the General Clauses Act unless a different intention appears, the repeal of an enactment will not affect any right, privilege, obligation or a liability acquired, or accrued or incurred under an enactment so repealed and therefore the right of the assessee not to have his documents disclosed has not been repealed as no different intention appears in the Finance Act of 1964.

It has been held by the Supreme Court in *Commissioner of Income-tax* v. *Scindia Steam Navigation Co., Ltd.*[1] at page 608, that the jurisdiction of a Court in a Reference

1. (1962) 2 S.C.J. 322 : (1962) 1 S.C.R. 788.

under section 66 is a special one different from its ordinary jurisdiction as a civil Court, and the High Court hearing a Reference under that section does not exercise any appellate or revisional or supervisory jurisdiction over the Tribunal, and that it acts purely in an advisory capacity on a Reference which properly comes before it under section 66 (1) and (2).

Again in *Petlad Turkey Red Dye Works Co., Ltd.* v. *Commissioner of Income-tax*[1] the Supreme Court held that the jurisdiction of the High Court under section 66 of the Indian Income-tax Act is purely advisory and is confined to giving opinion on a question of law, arising out of the order of the Appellate Tribunal.

This Court in a case reported in *First Additional Income-tax Officer* v. *Shanmugha Rajeswara Sethupathi*[2] held that the Income-tax proceedings cannot come within the scope of the expression ' civil proceedings '. The same view was reiterated by this Court in *Chettiappan* v. *I.T.O.*[3] where it was held that the Income-tax proceedings are revenue proceedings and that a certificate under Article 133 (1) (*c*) of the Constitution could not be granted. From the decisions cited above, it is clear that the proceedings under the Indian Income-tax Act are not civil proceedings, and that the jurisdiction of the High Court is purely advisory in nature and therefore the rules relating to suits and appeals in exercise of the civil jurisdiction are not applicable to these proceedings.

While it is contended on behalf of the Income-tax Department that in spite of the repeal of section 137 of the Income-tax Act of 1961, under section 6 of the General Clauses Act the right of the assessee to his affairs not having disclosed is still protected, the learned Counsel for the petitioner would contend that the protection granted under section 137 has been taken away and that an intention to take away the protection is apparent from the repeal itself which would exclude the operation of section 6 of the General Clauses Act, it was further contended on behalf of the petitioner that (while section 138 of the 1961 Act as amended by) Act V of 1964 a provision is made for application to the Commissioner for information in respect of an assessment made on or after 1st April, 1960, no corresponding provision is made regarding assessment made before 1st April, 1960 and this would imply that the Legislature intended that no protection should be given regarding information in respect of assessment made before 1st April, 1960. Though the question raised by learned Counsel is interesting, it is unnecessary to decide the question in this petition. For as already observed even if it is taken that there is no prohibition against inspection or furnishing of copies of the documents, the petitioner has failed to make out a case on merits for inspection and for grant of copies of documents.

The petition is dismissed. No order as to costs.

V.S. *Petition dismissed.*

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1. (1963) 1 S.C.J. 248 : (1963) 1 I.T.J. 147 : (1963) 1 S.C.R. (Sup.) 871.
2. (1963) 2 M.L.J. 395 : (1963) 2 I.T.J. 324 : I.L.R. (1963) Mad. 620.
3. (1964) 2 M.L.J. 289 : (1964) 2 I.T.J. 287 : I.L.R. (1964) 2 Mad. 704.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

R. Ganesan .. *Applicant**

v.

Commissioner of Income-tax, Madras .. *Respondent.*

Income-tax Act (XI of 1922), sections 9, 16 (3)—Transfer of assets—Transfer of funds by assessee to wife for construction of house standing in her name and wife resident therein—Transfer for inadequate consideration—Transfer of fund, transfer of asset—Income from house—Measure of income, measure of benefit of enjoyment incidental to ownership thereof—Not deemed income—May be notional but real income—Income as determined under the head of " Income from Property " includible in the income of assessee.

The assessee in the account year relevant to the assessment year, constructed a house at a cost of over Rs. 1,25,;00 in the name of his wife. In the assessment proceedings it was found as a fact that the assessee had given a sum of Rs. 75,000 to his wife for the purpose of the construction of the house. The Income-tax Officer in the view that the transfer of money was not for adequate consideration computed three-fifths of the income from the house and included the same in the income of the assessee under section 16 (3) of the Act. The Appellate Assistant Commissioner in appeal directed deletion of any part of this income in the income of the assessee. The Tribunal, however, allowed the appeal preferred by the Department. On a Reference at the instance of the assessee under section 66 (1),

Held, the income from the property is includible in the total income of the assessee under section 16 (3) but the measure of that income would have to be computed in accordance with the first proviso to section 9 (2) of the Act.

The sum contributed by the assessee for the construction of the house is an asset transferred to the wife within the scope of section 16 (3).

Section 16 (3) does not require that the income arising from property should be an income in the shape of money only. The expression " income as arises directly or indirectly " in the section can include the benefits arising from the enjoyment of the property. The use of the word " indirectly " is broad enough to take in income which is not received in specie but represents, such advantages as the enjoyment of the property might secure, the value of which could be translated in terms of money

Under section 9(1) of the Act, the property and its ownership are the only two criteria that are taken into consideration and what is brought to tax is the annual value of the property. In such determination, the use of the expression " annual value of any property . . . . might reasonably be expected to let from year to year " in section 9 (2) does not mean that the income itself is a deemed income. The measure of the enjoyment of the property incidental to the ownership thereof is the measure of the income derivable from the property and it is the quantification of that measure of income that is contemplated by section 9 (2) of the Act. It is true that the income in the case of a person occupying the property is notional, but nevertheless the law regards it as an income which is liable to tax.

Section 9 determines the income derived from the property under the head " Income from property ". If the owner of the property is in receipt of income as determined by the application of section 9 (2) of the Act, it is only that income which can be brought in for inclusion under section 16 (3) of the Act.

Reference under section 66 (1) of the Indian Income-tax Act, 1922.

R. M. Seshadri, Advocate, for Applicant.

V. Balasubramanyan, Standing Counsel for Income-tax, for Respondent.

The Judgment of the Court was delivered by

Srinivasan, J.—The assessee is a prominent film artiste. In the account year relevant to the assessment year 1960-61, he constructed a house at a cost of over Rs. 1,25,000. This property stands in the name of his wife. It was found as a fact in the assessment proceedings that the assessee had given a sum of Rs. 75 000 to his wife for the purpose of this construction. The Income-tax Officer took the view that since that was a transfer of this volume of an asset to the wife and that transfer was not for adequate consideration, the proportionate income from the property should be included in the income of the assessee. He computed three-fifths of the income as so includible in the assessment of the assessee. The assessee appealed. One of the points raised was there was no transfer of any asset to the wife which could be brought under section 16 (3) of the Act. The contention was that the assessee

*T.C. No. 269 of 1962. 1st March, 1965.

had only advanced funds for the purpose of construction and that could not be construed as a transfer of an asset. This argument prevailed with the Appellate Assistant Commissioner, who directed the deletion of any part of the income from the house from the total income of the assessee.

The Department took the matter in appeal to the Tribunal. The Tribunal found as a question of fact that the assessee did transfer a sum of Rs. 75,000 to the wife without any adequate consideration and that this sum was utilised for the construction of the house. The Tribunal took the view that even if it was only money that was transferred, it could still be brought within the scope of section 16 (3) of the Act. The further contention advanced was that there was no receipt of any real income from the property, for, the owner, the wife of the assessee, was actually residing therein and it was urged that it is "real" income as opposed to "notional" income that could be brought within the scope of section 16 (3) of the Act. This contention was also negatived by the Tribunal. Lastly, it was urged that section 9 of the Act places an upper limit in the matter of taxation of residential property, and since the income assessed, as being derived from this property has to be limited to 10% of the income of the owner, the amount can be included in the assessee's income, as the owner's income in the relevant year was nil. This contention will be elaborated in due course, but it would suffice to say that that was also rejected.

On the application of the assessee, the following question was referred by the Tribunal for the determination in this Court :

"Whether any part of the income from the house property could be included in the hands of the assessee, and if so, what part ?"

Mr. R. M. Seshadri, learned Counsel for the assessee, cannot at this stage dispute the finding of the fact that a sum of Rs. 75,000 was in fact provided by the assessee for the construction of this house, and since the house as ultimately constructed stands in the wife's name and this property is admittedly owned by her, the sum contributed by the assessee for the construction cannot but be regarded as an asset transferred to her. Notwithstanding this, Mr. Seshadri argues that section 16 (3) of the Act has no application, and even if it applies, it has to be read along with section 9 of the Act which brings to tax income from property; if so done, no part of the income from this property can be included in the income of the assessee.

The relevant part of section 16 of the Act reads thus :

"In computing the total income of any individual for the purpose of assessment, there shall be included so much of the income of a wife.... of such individual as arises directly or indirectly,....

. . . . . .

(3) from assets transferred directly or indirectly to the wife by the husband otherwise than for adequate consideration or in connection with an agreement to live apart."

This provision accordingly requires that where any asset has been transferred to the wife in such circumstances as indicated and the wife derives an income from that asset, that income shall be included in the total income of the assessee. The findings of fact here are that the sum of Rs. 75,000 was in fact transferred by the assessee to his wife and that with this sum, the house was constructed. That the transfer was not for adequate consideration or in connection with an agreement to live apart is also not denied. If so much is established, then if any income is derived by the wife from the asset so transferred, it has under law to be included in the total income of the assessee. In disputing the applicability of section 16 (3) of the Act Mr. Seshadri urges that no income is in fact derived by the assessee's wife from the property. According to the learned Counsel, it is only the income which is actually derived—the expression used in the section is "arises"—that can be brought within the scope of section 16 (3). It is claimed that the owner of the property, that is, the wife of the assessee, lives in the house and that being so, she does not derive any income. If at all, it is only notional income that can be said to be received by the wife when she personally occupies the house in question. Mr. Seshadri's contention is that it is only a real income and not a deemed or notional income that can be the subject-matter of section 16 (3).

It is true that in *Commissioner of Income-tax* v. *Sir Homi Metha's Executors*[1], a Bench of the Bombay High Court laid down that income should be a real income before it can be brought to tax. In that case, the assessee and his sons formed a private limited company and transferred to that company shares in several joint-stock companies which they held. The cost price of these shares was in the region of Rs. 30,00,000 while the transfer to the private limited company was at the prevailing market value of about Rs. 40,00,000. The Income-tax Authorities purported to hold that the difference represented a profit and levied income-tax. The learned Judges point out that the transfer of the shares to the private limited company, though it was no doubt a sale, did not represent a business activity entered into with the object of earning a profit. The same persons who held the shares previously continued to hold them even after the transfer and the sale was merely a procedure adopted to adjust their position as holders of shares. In the commercial sense, therefore, there was no profit or gain by reason of the transfer. The learned Judges observe at page 932:

> "It is a trite saying that in income-tax matters one must look at the real nature of the transaction. Whatever legal or technical form a transaction may take, the Court must try and determine what the real transaction was and not the form which the transaction took. It is equally true to say that a transaction for the purposes of income-tax must be looked at from a commercial point of view................In trying to determine whether a certain transaction resulted in profits, we must come to a conclusion that the transaction resulted in real profit, profits which from the commercial point of view meant a gain to the person who entered into the transaction, not profits from any narrow, technical or legalistic point of view."

Relying upon this decision, Mr. Seshadri contends that only real income can be brought to tax, and it is his argument that in the circumstances of the present case, no income at all resulted to the assessee's wife.

It is difficult to follow the line of reasoning adopted. As has been found by the Department, it was not the case of the assessee that there was no transfer of any amount at all or that the title to the property, that is, the house, which is in the wife's name, is benami for the assessee himself. The sum which the assessee gave to his wife represented an asset which he had transferred to her. The question however is whether any income arose to the wife from the assets so transferred. The asset transferred has taken the shape of house property. The contention that we are to examine is whether section 16 (3) requires that the income arising from the property should be an income in the shape of money. It is true that because the wife resides in the house, she is not in actual receipt of any income represented by rents or the like. But would it be true to say that no income at all arises to her from the property in question ? We are unable to say that the expression " income, as arises directly or indirectly " cannot include the benefits arising from the enjoyment of the property. The use of the expression " indirectly " is broad enough to take in an income which is not received in specie but represents, such advantages as the enjoyment of the property might secure, the value of which advantages could be translated in terms of money. On the section as it is worded, we are unable to agree with Mr. Seshadri that where the wife resides in the house property and does not receive any rents from the property, it is only notional income that can be said to arise and that such notional income is not within the scope of section 16 (3).

Mr. Seshadri elaborates his point further by reference to section 9 of the Act. Section 9 deals with the tax payable by the assessee under income from property. Broadly stated, the tax is payable on the *bona fide* annual value of the property. Section 9 (2) provides that the annual value of a property shall be deemed to be the sum for which the property might reasonably be expected to let from year to year. The proviso to this section deals with cases where the property is in the occupation of the owner for the purposes of his own residence and it lays down that in such a case the annual value as determined shall be reduced in a particular manner and the reduced amount shall be taken to be the income from the property for the purposes of tax. Mr. Seshadri urges that section 9 (2) itself creates a fiction when it says that the

1. (1955) 28 I.T.R. 928 (932) : 58 Bom.L.R. 112 : I.L.R. (1956) Bom. 154.

annual value of any property shall be "deemed" to be a particular sum, and if it is only a deemed income within the meaning of section 9, that cannot be brought within the scope of section 16 (3). We are unable to accept the contention of the learned Counsel that it is only a deemed income and not a real income that is contemplated by section 9 (2) or the first proviso thereto. Section 9 (1), which defines the taxable income in respect of property lays down that the tax shall be payable in the case of all properties in respect of the *bona fide* annual value of the property of which he is the owner. The property and its ownership are the only two criteria that are taken into consideration, and what is brought to tax is the annual value of the property. It is the presumption of the taxing enactment that every property is capable of yielding income, and the law lays it down that it is the annual value of the property that shall be the amount upon which tax is to be levied. What section 9 (2) endeavours to lay down is only the determination of the annual value of the property. In the wording employed "annual value of any property might reasonably be expected to let from year to year" the section does not lay it down that the income itself is a deemed income. As we observed, the ownership of property carries with it the enjoyment of the property, and the measure of that enjoyment is the measure of the income derivable from the property and it is the quantification of that measure of income that is contemplated by section 9 (2) of the Act. We do not agree with the learned Counsel that it is not a real income that is contemplated by section 9 (2).

Reference has been made by the learned Counsel to *Tennant* v. *Smith*[1]. That was a case where the question arose whether the value of a residence provided by the employer is not an emolument of office in respect of which the employee is chargeable to income-tax . Further details of that case are not necessary except to observe that the question went upon a consideration of the various Schedules to the English Act under one or other item of which, any item of receipt of income is taxable. Learned Counsel refers to the following passage at page 171 :

> " No doubt, if the appellant had to find lodgings for himself, he might have to pay for them. His income goes further because he is relieved from that expense. But a person is chargeable for Income-tax under Schedule D as well as under Schedule E not on what saves his pocket but on what goes into his pocket, and the benefit which the appellant derives from having a rent-free house provided for him by the bank brings in nothing which can be reckoned as a receipt or properly described as income."

It is equally argued by Mr. Seshadri that the only manner in which a person occupying his own house can be said to receive any income is upon the view that if he did not occupy it, he would have to pay rent for another premises. In the light of the observations extracted above Mr. Seshadri urges that it cannot be regarded as income as nothing " comes in ". We are unable to apply this decision to the facts of the case, for in our view, section 9 of the Act brings to tax a certain class of income, though such incomes do not always " come in " in the sense indicated in the decision. Mr. Balasubramanyam, learned Counsel for the Department, refers to Simons "Income-tax", Vol. I (2nd edition) at page 502 dealing with income from property, which is dealt with under Schedule A in the English Act. It is observed :

> " The theory behind Schedule A is that the possession of an interest in property gives rise to income, a theory which is not always borne out in fact. That there may be no income in fact is disregarded when the assessment is made. The actual or hypothetical income has to be measured by some standard for the purpose of taxation and the standard prescribed is the annual value. This principle has been subject to adverse comment, but once the theory is appreciated, the method may be understood and any confusion of thought created by the words of the charging section dispelled....."

Earlier it is pointed out that in *Shanks* v. *The Commissioners of Inland Revenue*[2] the phrase "property in land", was held to include any right of occupation which gives the occupier the benefit of the annual value. This accords with the view that we hav expressed that the benefit arising from the enjoyment of the property is really what is brought to tax and not the receipt of any income in terms of money.

We have already indicated the next line of argument. Mr. Seshadri contends that section 16 (3) itself is a deeming provision and it can only mean that an income

1. (1892) 3 T. C. 158.
2. (1929) 14 T.C. 249 : L.R. (1929) 1 K.B. 342.

which is not that of the assessee but that of his wife is in certain circumstances deemed to be the income of the assessee himself. His argument is that what is not a real income, but a deemed income, in the hands of the wife cannot once again be deemed to be that of the assessee liable for assessment in his hands. Turning to section 9, he claims that section 9 itself, in so far as it brings to tax the annual value of the property, deems a certain sum to be the income from the property, so that it is not a real income that is dealt with under section 9. It is thus his contention that what is only a deemed income under section 9 cannot be brought within the scope of section 16 (3) which, according to him, deals only with a real income of the transferee, which is assessed in the hands of the transferor, the assessee. Firstly, we may point out that it is not a deemed income at all that is dealt with under section 16 (3), that is to say, the law does not say that the income of the wife shall be "deemed" to be the income of the assessee. What in effect it provides for is that an income received by the wife in certain circumstances shall be taxed in the hands of the assessee. Section 16 (3) sets out the mode of computation of the income of a person who has transferred certain assets to his wife, and in certain specified circumstances the income arising from the transferred asset is taxed in the hands of the husband himself. It may be said in a manner of speaking that the income of the wife is deemed to be that of the husband, but the section itself does not say so. Even apart from that, we have already pointed out that section 9 itself does not create an artificial income. The fact that in respect of the property the income is not received in rupees, annas and pies does not lead to the position that no income at all is derived therefrom. The section clearly postulates that an owner of property is in receipt of a certain income therefrom which is computed for the purpose of tax in terms of the *bona fide* annual value of the property. The taxability of any income statutorily presumed to arise from the ownership of property is the basis of this provision. When once it is taken as an established proposition that every owner of property derives a measure of income from the property—in certain cases it will be an actual receipt of income realised by letting out the property, while in certain others it will be a notional income resulting from the enjoyment of the property by the owner himself—the law provides for the manner of computation of that income, and it states that the annual value of the property shall be deemed to be the sum for which the property is let, and that annual value is taken as the income liable to tax. It is true that this income in the case of a person occupying the property is notional, but nevertheless the law regards it as an income which is liable to tax. It is nonetheless real income and the argument of Mr. Seshadri that, since it is a deemed income, it cannot come within the scope of section 16 (3), fails to convince us.

The next question which arises is, what is the extent of the income from the property which can be assessed in the hands of the assessee ? In dealing with this, the Tribunal said that the upper limit provided for the taxability of the income under section 9 of the Act would be relevant in the case of an assessment on the owner of the property and would not be taken into consideration when the income of the owner is sought to be taxed in the hands of the assessee and her husband. Mr. Seshadri contends that this conclusion is erroneous. The first proviso to section 9 (2) of the Act is important in this context. While section 9 (1) imposes a tax on the *bona fide* annual value of the property, the mode of the computation of the *bona fide* value of the property is laid down in sub-section (2). The proviso to section 9 (2) deals with a case where the property is in the occupation of the owner for the purposes of his own residence. In that case, the annual value is first determined as in a case where a property is let out to a tenant and that amount is reduced by one half or by Rs. 1,800, whichever is less, and the reduced sum is taken to be the annual value of the property liable to tax under section 9 (1) of the Act. There is the further limitation imposed, that is, if the sum so arrived at exceeds 10% of the total income of the owner, the annual value of the property shall be deemed to be 10% of such total income. According to Mr. Seshadri, it is this income, that is to say, the sum as reduced or 10% of the owner's income, whichever is less, that can be taken in for assessment under section 16 (3) of the Act, for, according to the learned Counsel the sum so reduced, or 10% of the total income of the owner, is, by virtue of the pro-

visions contained in section 9, regarded as the annual value of the property, that is to say, the income that can be brought to tax. It seems to us that this contention has to be accepted. Under section 6 of the Act, among the various heads of income chargeable to tax is income from property. That is dealt with in section 9 and this section determines the measure of the income derived from the property in a variety of circumstances. The law accordingly presumes that the owner of the property is in receipt of that income as determined by the application of section 9 (2) of the Act, and if that is the income which the owner of the property derives, it is only that income which can be brought in for inclusion under section 16 (3) of the Act. We are unable to see how in so far as the assessment of the assessee is concerned or the computation of his total income by the application of section 16 (3) of the Act requires, any higher income in respect of the property could be brought in than what the law by a particular mode of computation determines as the income from the property. Whether it is in the assessment of the owner of the property or the assessment of the assessee in respect of the income from that property by reason of section 16 (3) of the Act the mode of determination of the income from the property is equally applicable. It would follow therefore that the sum that can be included in the total income of the assessee in respect of the property in question must be the sum which is arrived at on the application of section 9 (2) and the first proviso thereto. It would be for the Departmental Authorities to determine the amount on the lines indicated above.

The question is accordingly answered thus : The income from the house property is includible in the total income of the assessee, but the measure of the income to be so included will be subject to the first proviso to section 9 (2) of the Act. Since the assessee has succeeded in part, there is no order as to costs.

V.S. *Answered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE T. VENKATADRI.

Palani Ammal .. *Petitioner**

v.

The Safe Service, Limited, Salem and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), sections 110 (1) and 110-A to 110-F—Scope and object of—Motor Accidents Claims Tribunal constituted under—Jurisdiction of—If could entertain claims for damages in respect of accidents that occurred prior to its constitution.

Interpretation of statutes—Retrospective effect—When presumed—Ouster of jurisdiction of civil Court—If could be assumed.

A Motor Accidents Claims Tribunal constituted under section 110 (1) of the Motor Vehicles Act will have jurisdiction to entertain claims for compensation even in respect of claims for damages arising out of accidents that occurred prior to its constitution, so long as a suit in a competent civil Court has not been instituted in respect of the claim and the claim is alive. It is no doubt true that a right to institute a suit is a vested right that cannot be taken away by subsequent legislation and a suit once instituted in a civil Court cannot also be transferred to the Claims Tribunal. Hence the bar of jurisdiction under section 110-F of the Motor Vehicles Act cannot be in regard to matters in respect of which claims had not been entertained by the civil Court before the constitution of the Tribunal.

Where an accident occurred prior to the constitution of a Tribunal under the Act for any area, it will no doubt be open to the person injured or his legal representatives to file a regular suit in a civil Court if they are so minded. But this could be done only before the constitution of a Tribunal under the Act as the effect of the new provision is to create a new forum taking away the jurisdiction of the ordinary civil Court. The creation of a different forum and curtailment of the period of limitation are only matters of procedure and do not affect the rights of the injured or his legal representative.

Where a new forum is pointed out by an Act of the Legislature in respect of a pre-existing right, which, under the law as it existed at the time when the new enactment came into force, was alive, such rights could be enforced in the forum designed by the new Act, notwithstanding the fact that the period

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*C.R.P. Nos. 2108 and 2109 of 1963. 28th August, 1964.

of limitation prescribed under the new Act is shorter than that which existed before. When an Act prescribes a new remedy and prescribes the same as the exclusive one in respect of a cause of action for which there previously existed a right of action in a civil Court, it is the new remedy and no other that has got to be adopted by the litigant for the vindication of his rights.

Petitions under Article 227 of the Constitution of India, praying that the High Court will be pleased to revise the decrees of the Motor Accidents Claims Tribunal (District Judge), Salem, dated 2nd August, 1963 in M.A.C.A. Nos. 9 and 16 of 1962.

A. Ramanathan and *R. Vedantham*, for Petitioner.

N. G. R. Prasad for *Row* and *Reddi*, *N. C. Raghavachari*, *N. S. Varadachari* and the Government Pleader, for Respondents.

The Judgment of the Court was delivered by

Ramachandra Iyer, C. J.—These two Civil Revision Petitions filed under Article 227 of the Constitution, have been heard together as they raise a common question as to the jurisdiction of the Tribunal constituted under section 110 (1) of the Motor Vehicles Act, 1939. The facts giving rise to these petitions are these. Kandaswami, the husband of the petitioner in the first of these petitions, met with an accident which resulted in his death. The accident took place on 4th June, 1961 on the Hasthampatti-Sooramangalam Road, Salem, when he was run over by a bus belonging to the first respondent in that case. The petitioners in the second petition are the widow, son, daughters and mother of one Varadappa Goundan, who on 22nd November, 1960, while riding a bicycle on the Salem-Tiruchi Road, was knocked down by a lorry owned by the State of Madras; the accident resulted in his death. The petitioners in the two cases, respectively filed on 9th January, 1962 and 13th October, 1961, applications before the Motor Accidents Claims Tribunal Salem, for recovery of compensation from the owner of the motor vehicle concerned in the accidents. In the first of the cases the insurer was also made a party. The learned District Judge, Salem, who functioned as the Tribunal under the Act has returned the claims on identical reasoning for presentation to the civil Court holding that inasmuch as the Tribunal was constituted by the Government for the first time only on 12th July, 1961, under a notification issued by it under section 110 (1) of the Act, it would have no jurisdiction to entertain the claims in respect of accidents which had taken place prior to its constitution. This view of the Tribunal derives support from the unreported judgment of Jagadisan, J., in C.R.P. No. 1520 of 1962. A contrary view has, however, since been expressed by Veeraswami, J., in W.P. Nos. 216 and 217 of 1962.[1]

The sole point that falls for consideration in the two cases is, whether the Tribunal constituted under section 110 (1) of the Motor Vehicles Act has jurisdiction to entertain claims in respect of accidents that occurred prior to its constitution.

Section 110 in its present form as well as sections 110-A to 100-F were introduced into the main Act by the Central Act C of 1956, which received the assent of the President on 30th December, 1956. Under the terms of the Amending Act, the provisions contained therein were to come into force on a day to be appointed by the Central Government by Notification in the Official Gazette. The appointed day was notified as 16th February, 1957. Section 110 of the main Act provides for the constitution by the State Government by Notification in the Official Gazette of Motor Accidents Claims Tribunal for such areas as may be specified therein for the purpose of adjudicating claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of motor vehicles. By a Notification dated 12th July, 1961, the State Government constituted Claims Tribunals in this State.

We shall now refer to the relevant provisions of the Motor Vehicles Act regarding the jurisdiction of such Tribunals. Section 110-A (1) provides, that an application for compensation in respect of claims mentioned in section 110 may be made to the Tribunal constituted under the Act for the area in which the accident occurred,

Since reported as *V.C.K. Bus Service* v. *Sathna* (1965) 1 M.L.J. 203 : I.L.R. (1965) 1 Mad. 136.

by the person sustaining the injury, or by the legal representatives of the deceased, where death has resulted from the accident. Sub-clause (3) to that section says that no application for compensation shall be entertained unless it is made within 60 days of the occurrence of the accident. But there is an important proviso to that provision which enables the Tribunal to entertain the claim after the expiry of the period, if it is satisfied that the applicant was prevented by sufficient cause from making the application in time. Sections 110-B to 110-E provide for the award of compensation by the Tribunal, its powers and the procedure to be followed and for appeals against such awards and for recovery of money thereunder. Section 110-F, which is important to this case, runs:

"Where any Claims Tribunal has been constitutional for any area, no civil Court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claim for compensation shall be granted by the civil Court."

Prior to the legislative provisions referred to above, the legal representatives of a person who met with his death in an accident, could sue the wrong doer for damages in the ordinary civil Court by virtue of the Indian Fatal Accidents Act, 1855. Article 21 of the Indian Limitation Act, 1908, provided a period of one year from the date of the death of the persons killed for filing such an action. The object of Sections 110 to 110-F of the Motor Vehicles Act is to provide a cheaper and speedier remedy to such persons. Sections 110-F confers exclusive jurisdiction upon the Tribunal constituted under the Act to dispose of such claims and it takes away the jurisdiction of the civil Court to entertain suits relating to such claims.

A plain reading of the sections referred to above, makes two things clear: (i) that section 110-F which takes away the jurisdiction of the civil Court was not intended to be retrospective so as to affect the jurisdiction of the civil Court in respect of suits or actions which it had entertained before the constitution of the Tribunal under section 110 (1); and (ii) sub-clause (3) of section 110-A which provides for a time limit for the filing of application for compensation as well as the condoning of the delay in the presentation of such an application, postulates the previous existence of the Tribunal.

Therefore, the intention of the Legislature must have been that the bar of the jurisdiction of the civil Court enacted in section 110-F must only be in regard to matters in respect of which claims had not been entertained by the civil Court before the constitution of the Tribunal. The terms of that section which provide that no civil Court shall entertain any question therefore mean that it cannot, after the constitution of the Tribunal under the Act take cognizance of a suit or other proceeding in respect of such claims. If before the constitution of the Tribunal the civil Court had entertained a suit or proceeding respecting such claim, there is nothing in the Motor Vehicles Act to take away its jurisdiction. As Jagadisan, J., has pointed out, there is no provision in the Motor Vehicles Act for transfer of pending actions to the Claims Tribunal.

But, in the present case, no suit or other proceeding has been filed in any civil Court in respect of the claims for damages for the accidents in question before the constitution of the Tribunal. These accidents which gave rise to the causes of action in favour of the legal representatives of the deceased in the two cases took place before the constitution of the Tribunal. If those persons had so minded they could certainly have instituted suits for damages in the ordinary Courts of the land before the constitution of the Tribunal.

The contention of the petitioners in the present case is that once the Claims Tribunal came into being, it alone had jurisdiction to entertain the claims and the jurisdiction of the civil Court must be deemed to be excluded. Jagadisan, J. was not prepared to accept this view, as the learned Judge was of the opinion that a right of suit being a vested right, could not be deemed to be taken away by section 110-F, which was prospective in its operation. With respect, we think that the proposition has been rather broadly expressed. As we pointed out, section 110

provides a speedier remedy, obviously conceived as a better one from the point of view of the injured person or his unfortunate dependants. No new right or even a new remedy has been created by that provision; the forum alone is changed. The right to claim damages by the legal representatives of a deceased in respect of an accident, where the latter met with his death, was actionable under the pre-existing law, in the civil Court. The effect of the new provision is to create a new forum thus taking away the jurisdiction of the ordinary civil Court. The aggrieved person has, as before, a remedy for damages in respect of the injury. The forum alone is changed. The period of limitation has also been curtailed but these two are matters of procedure.

In other words, while one can readily agree that a right to sue for an injury is a vested right, which, in the absence of express words, or necessary intendment, a statute subsequently passed cannot be construed as taking it away the same cannot be said with respect to the forum in which a particular action is to be agitated or the time within which such remedy is to be obtained. The last mentioned matters relate only to procedure, and the law prevailing at the time of the institution of the action will alone govern such matters.

Reference was made to the decision in *Henshall* v. *Porter*[1] The plaintiff in that case gave cheques for an amount of £333 to the defendant in respect of losses incurred in horse racing. On 22nd February, 1923, he issued a writ in the action claiming a return of the amount, purporting to do so under section 2 of the Gaming Act, 1835. But even before the commencement of the action, the Gaming Act of 1922, had come into force, which, if applicable, would render the plaintiff's claim futile. A question arose whether that Act would be applicable. Section 1 of the Gaming Act stated:

> "Section 2 of the Gaming Act, 1883........is hereby repealed. . . . No action for the recovery of money under the said section shall be entertained in any Court."

It was held that the plaintiff's cause of action which vested in him before the Act of 1922 came into force, and had not been abrogated by the new Act. Mc Cardie, J., observed:

> "In my opinion, the Act of 1922, must be considered in the light of the settled, recognised and beneficient rule of law that existing rights are not to be deemed to be destroyed by statute unless there be express words or the plainest implication to that effect."

But it must be noticed that under the Gaming Act, 1922, the right to sue for moneys had been completely taken away. It is not as if a different remedy was provided for its recovery and there was no question in that case of one forum being substituted for another, or a shorter period of limitation being prescribed for suits to recover such monies. What that decision held was that the later Act, which took away such a right of action, which, on its terms was to have only prospective operation, was not to affect the action instituted in respect of a right which existed prior to that enactment. The case will be different, where a different and exclusive remedy is provided for an existing cause of action. We shall now refer to a case on the latter aspect. In *Lane* v. *Lane*[2], a question arose as to the retrospective operation of section 4 of the Summary Jurisdiction (Married Women) Act, 1895. That provision gave certain summary remedies to a wife against her husband who had been guilty of persistent cruelty to her, thereby causing her to live apart from him. Before that provision was enacted persistent cruelty on the part of a husband would have entitled the wife to have judicial separation with all its attendant consequences. Although the desertion in that case, which gaver rise to a right on the part of the wife to seek judicial separation, occurred prior to the commencement of that Act, it was held, that she had the right to approach the Court for summary remedy under section 4. Sir F.H. Jeune, the President of the Probate Division observed:

> "It is contended that this particular portion of the section creates offence a new remedy and is therefore, prospective only in its operation. That is not, I think, a sound contention. It does not appear to me that a new offence is created, and there certainly was remedy in this Court for the very same thing that the respondent is accused of."

1. L.R. (1923) 2 K. P. 193. 2. L.R. (1896) Pro. Dn. 133.

The learned President therefore held that the section will have retrospective operation.

In *Ramkaran* v. *Ramdas*[1], Sulaiman, C.J., observed :

> "No doubt, a substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantial right. The selection of forum and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right though it certainly places a bar against the remedy by suit."

This view was reiterated later in *Hazari* v. *Mt. Maktula*[2], In that case, the Agra Tenancy Act, 1926, took away the pre-existing jurisdiction of the civil Court to try certain classes of suits, which, after coming into force of that Act, were to be filed only in the Revenue Courts. The Act also provided for a shorter period of limitation for the application to be filed before the Revenue Court. It was argued that the larger period of limitation available to the plaintiff under the pre-existing law was a vested right and that, therefore, the provisions of the new enactment for the filing of applications within a particular time could not be read as retrospective. The learned Judges repelled that contention on the ground that there could be no vested right in the choice of any particular forum and observed :

> "If the Legislature has thought fit to deprive the civil Court of its jurisdiction to entertain suits of a particular nature, a plaintiff cannot compel the civil Court to hear his suit merely because his cause of action had accrued before the new Act depriving the civil Court of its jurisdiction was passed. The choice of forum, is a matter of procedure and not a substantive right, and in most cases a new Act not affecting a pending action does not apply."

It was also held that there could be no vested right in the period of limitation fixed under the pre-existing law. But this must be read subject to an important qualification. Where a new forum is pointed out by an Act in respect of a pre-existing right, which, under the law as it existed at the time when the new enactment came into force, was alive, such rights could be enforced in the forum designated by the new Act, notwithstanding the fact that the period of limitation prescribed therein (under the new Act) is shorter than that which existed before.

We may, in this connection, refer to the decision in *Rajah of Pittapur* v. *Venkatasubba Rao*[3]. In that case, the landholder who attained the age of majority in 1906 was entitled to recover arrears of rent from certain of his ryots. Under the law as it existed prior to the coming into force of the Madras Estates Land Act (1st July, 1908), the landholder was entitled to sue for such arrears in the civil Court, taking advantage of the provisions of section 7 of the Indian Limiation Act, which gave him a period of three years after attaining the age of majority. Before he filed suits for recovery of such arrears, the Estates Land Act, 1908 came into force, which constituted the Revenue Court as the forum and prescribed a summary remedy procedure for recovery of rents by a landholder against his ryots. That Act did not confer on the landholder the benefit of section 8 of the Limitation Act. Nevertheless, the landholder instituted suits in the Revenue Court for recovery of the arrears of rent, and the point that fell for determination in the case was whether the suits were in time. It was held by the majority who constituted the Bench that inasmuch as the claim to recover arrears of rent was alive on the date when the Estates Land Act came into force, the landholder should be held entitled to recover the money. Kumaraswamy Sastri, J., observed :

> "The correct rule seems to be that though laws affecting limitations might abridge or enlarge periods of limitation in cases of suits or causes of action which were active at the date when the new enactment came into force and which under the old law would expire afterwards, the change cannot unless there is a clearly expressed intention to the contrary either by apt words in the enactment or otherwise, be retrospective as to destroy rights of suits which were alive on the date."

This principle is but an application of the general rule that a right of action existing on the date when an Act came into force cannot be held to be taken away in the

1. (1931) I.L.R. 54 All. 299, 306. (F.B.)
2. A.I.R. 1932 All. 30.
3. I.L.R. (1915) 39 Mad. 645 : 29 M.L.J. 1.

absence of words in the statute to the contrary effect merely for the reason that a shorter period of limitation has been provided under the new Act for such matters. It is also significant that in that case the learned Judges accepted the position that the Revenue Court was competent to entertain the suits. Therefore, the rule can be stated thus : Where the Act creates a new remedy and prescribes the same as the exclusive one in respect of a cause of action for which there previously existed a right of action in a civil Court, it is the new remedy and no other that has got to be adopted by the litigant for the vindication of his rights. This is of course subject to there being no provision to the contrary in the statute. The fact that the cause of action arose before the new Act came into force, cannot therefore affect the question, so long as the remedy in respect of that cause of action had not become barred. The party will be entitled to and indeed compelled to, resort to the remedy prescribed under the Act, unless, as we said, there be words pointing to a different procedure in the statute itself. To reiterate the position where in respect of a right for which remedy existed at the common law, a statute provides a new forum as the exclusive one for the adjudication of such rights, it is the latter remedy that has got to be ordinarily resorted to. In such matters three types of cases can be conceived: (1) Where the cause of action arises after the new Act ; (2) where the cause of action has arisen before the new Act, in respect of which a suit has been filed in the ordinary civil Court before the coming into force of the new Act and (3) where the cause of action arose before the new Act but a suit in respect of the same had not been filed before the new Act came into force.

In a case where the statute prescribes a new forum with exclusive jurisdiction, there can be little doubt that the remedies in respect of the causes of action arising subsequent to its enactment must be in accordance with its provisions ; it is the new forum that has to be resorted to. The second of the cases mentioned above does not also present any difficulty. Unless there are words in the statute itself to effect or provide for a transfer of the proceedings instituted in the civil Court, it will have jurisidction to dispose of the suit which had been entertained by it. As regards the third class of cases, the matter will be governed by the terms of the statute. In the present case they exclude the jurisdiction of the civil Court to entertain the claim. Instead jurisdiction over such claims is given to the new Tribunal.

Learned Counsel appearing for the respondents invited our attention to two decisions of the High Court of Madhya Pradesh. The first of them is *Khatumal* v. *Abdul Quadir*[1]. That was a case where a suit was instituted in the civil Court before the Claims Tribunal was appointed under the provisions of the Motor Vehicles Act. It was held that it would be the civil Court and not the Tribunal that would be entitled to dispose of the claim. We find nothing in the judgment in that case against the view we are inclined to take. The other case is *Sushama Mehta* v. *C.P.T. Services, Ltd.*[2]. There the suit was filed in a civil Court in respect of a cause of action which arose subsequent to the constitution of the Tribunal. It was held that section 110-F of the Motor Vehicles Act could not affect the right of suit in respect of a cause of action which had accrued before the constitution of the Accidents Claims Tribunal and the civil Court alone would have jurisdiction to entertain the claim for compensation. The learned Judges based their conclusion on the reason that inasmuch as a vested right to sue the wrong-doer existed at the time when the Amending Act came into force and there was nothing in the Amending Act to deprive that right to the litigant, the civil Court's jurisdiction to entertain the claim notwithstanding the existence of the Tribunal must be upheld. With great respect to the learned Judge, we may point out that this view does not give full effect to the clear terms of section 110-F., which precludes the civil Court from entertaining any claim which could be filed before the Tribunal. On its terms no distinction can be made between a case of a claim arising before and one after the Tribunal is set up. From what we have stated above, it will be clear that the claims Tribunal will have jurisdiction to entertain the claims in respect of accidents that occurred before its constitution, provided the remedy of the aggrieved person was not barred

1. A.I.R. 1961 M.P. 295.
2. A.I.R. 1964 M.P. 133.

before it was constituted. We are therefore unable to share the view expressed by the learned Judges of the Madhya Pradesh High Court in the cases referred to above.

In a case similar to one before us, Veeraswami J., held that the Tribunal would have jurisdiction to entertain and decide the claim. We agree with that decision. In our opinion clause (3) of section 110-A which prescribes a period of sixty days from the date of the accident for the institution of a claim before the Tribunal, cannot be regarded as suggesting a different interpretation. On the principle of the decision in *Rajah of Pittapur v. Venkatasubba Rao*[1], the applications filed within the period limited by Article 21 of the Limitation Act, 1908, must be regarded as being in time. Even otherwise, the case will be one for excusing the delay in the presentation of the claims, if the Tribunal found sufficient cause for such delay.

We would however like to point out that one of the observations made by Veeraswami J., requires clarification. The learned Judge took it as a 'well-settled principle of construction that "exclusion of civil Court's jurisdiction will however be assumed where the statute prescribed a special forum for agitating a particular class of causes of action". This is not correct. The mere fact that a special remedy is provided for certain rights cannot by itself take away the jurisdiction of the civil Court. The true rule has been stated in the classic passage in the judgment of Willes J., in *Wolverhampton New Waterworks Co. v. Hawkesford*[2], thus:

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy; there, the party can only proceed by action at common law. But there is a third class viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it......The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class."

Now, the instant case will come under the first of the three classes of cases referred to above, inasmuch as prior to the statute in question there existed a liability at common law and remedy in the shape of action in the ordinary Courts. The foregoing passage also shows that the mere fact that the statute has provided a special and peculiar form of remedy will not have the effect of taking away the right to resort to the civil Court. The aggrieved person will have a choice between the two remedies. But, as stated above, this is subject to the qualification that the statute does not otherwise provide against the existence of both the remedies.

The terms of section 110-F of the Motor Vehicles Act which conferred exclusive jurisdiction on the Claims Tribunal however prohibit the civil Court from entertaining such claims. These terms must be regarded as containing words excluding the common law remedy.

It follows, that the view taken by the Tribunal below cannot be sustained. The Civil Revision Petition will be allowed and the case remanded to the Tribunal for adjudication on their merits. The respondents will pay the petitioner's costs.

R.M. *Petition allowed.*

1. I.L.R. (1915) 39 Mad. 645 : 29 M.L.J. 1. 2. (1859) 6 C.B. (N.S.) 336, at p. 356.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN AND MR. JUSTICE K. S. RAMAMURTI.

Ramakkal and four others .. *Appellants**

v.

Chinnappa Goundar .. *Respondent.*

Limitation Act (*IX of* 1908), *Articles* 57, 116 *and* 120—*Applicability and construction—Guardian and mother of Hindu minor borrowing money for purposes binding on minor's estate on registered promissory notes executed by her—Suit by creditor against minor after death of guardian embracing claim or right to reach the minor's estate on basis of right of subrogation—Period of limitation applicable—Principles to be observed in interpreting statute of limitation—Hindu Law—Minor—Borrowings by guardian for purposes binding on estate—Rights and remedies open to creditor.*

In determining the particular article of the Limitation Act applicable to a suit the language of the third column of the articles should be so interpreted as to effectuate the intention of the Legislature *i.e.*, dating the cause of action from a date when the remedy is available to the plaintiff. Undue stress should not be laid on the first column, and the third column should not be ignored; if in a particular case the acts come under the first column of a particular article. But the third column *i.e.*, the starting point of limitation under the circumstances, is inapplicable that article has to be rejected. Any construction which would result in time commencing to run against a party even before the right to sue has accrued in his favour should be avoided as such construction would result in obvious injustice and absurdities. The basis of the legal right on which relief is sought must be properly appreciated in order to determine the relevant article applicable to the action.

Where a creditor who has lent to the mother and guardian of a Hindu minor for purposes of necessity and to his estate under registered promissory notes executed by the guardian as such, brings a suit against the minor, after the death of the guardian reciting the execution of the registered promissory-notes and averring the moneys were lent for purposes binding on the minor's estate and that he was entitled to the right of subrogation on the basis of the liability of the minor's estate to reimburse, the guardian, and the suit, as framed, embraces the creditor's claim or right to reach the minor's estate on the basis of the right of subrogation by stepping into the shoes of the guardian who would be entitled to a reimbursement from the estate in respect of the moneys borrowed by her and utilised for the benefit of the estate, the proper article of limitation applicable to the suit, is Article 116 of the Limitation and not Article 57 or Article 120 of the Act.

When it is clearly found on the evidence that on a proper taking of accounts the guardian would be entitled to recover large sums of money by way of reimbursement, at any rate, sufficient to cover the claim involved in the suit of the plaintiff, he is certainly entitled to a decree against the estate when the suit has been brought within 6 years of the date of the registered promissory notes. All that the creditor has to aver and establish in such a suit is that his claim against the guardian for moneys advanced is subsisting, alive and had not been discharged by payment or otherwise and that as between the guardian and the minor the guardian would be entitled to reimbursement.

The distinction between an action on the debt or on the original cause of action and an action on the promissory notes is of no significance. It is also unnecessary for the creditor to file two separate suits, one by the creditor against the guardian and another against the minor, both the reliefs must be worked out in one and the same suit.

Sriramulu v. *Pundarikakshayya*, (1950) 1 M.L.J. 586: (1949) F.L.J. 288: A.I.R. 1949 F.C. 218, followed.

Principles and Procedure discussed.

Appeal under Clause 15 of the Letters Patent against the Judgment and decree of the Honourable Mr. Justice Ramakrishnan, dated 31st January, 1962 and passed in S.A. No. 1076 of 1959, preferred to the High Court against the decree of the District Court of Coimbatore, in Appeal No. 272 of 1957, preferred against the decree of the Court of the Subordinate Judge, Erode, in O.S. No. 70 of 1956.

D. Ramaswamy Ayyangar and *S. Palaniswami* and *S. Ramalingam*, for Appellants.

K. Rajah Ayyar, P.S. Balakrishna Ayyar, P. S. Ramachandran, for Respondent.

The Judgment of the Court was delivered by

Ramamurti, J.—This Letters Patent Appeal is preferred against the judgment of Ramakrishnan, J., in S.A. No. 1076 of 1959 and the main question that arises for determination is one of limitation.

The brief facts of the case are : One Kuttia Gounden, the paternal grandfather of Sinnappa Goundan (the defendant in the suit) executed a will on 11th

* L.P.A. No. 38 of 1963. 27th October, 1964.

September, 1944, under which he conveyed the properties specified in the E Schedule attached to the will, to Sinnappa Gounden. As he was then a minor, his mother, Kaliammal, was appointed as the guardian to mangage the properties till he attained majority. Kuttiah died in 1947 and, even though the will took effect, there was considerable opposition and obstruction from the other legatees under the will of Kuttiah aforesaid in the matter of Kaliammal taking possession of the properties bequeathed to the minor, resulting in numerous criminal and civil proceedings in the lower Courts and in this Court. Kaliammal could not obtain possession of the properties and she was obliged to file the suit, O.S. No. 74 of 1948 in Sub-Court, Coimbatore, to establish the rights of her minor son under the will. A Receiver was appointed in respect of the minor's share and the Receiver deposited the rent in the Court, but Kaliammal did not get into her hands any income from out of the estate. In order to meet the heavy cost of several Court proceedings and to meet the family expenses and the expenses of education of her minor son, Kaliammal was obliged to sell away her jewels and her personal stridhana properties and also borrow several sums of money for preserving the estate and obtaining possession thereof. She executed four promissory notes marked as Exhibits A-1 to A-4 in favour of one Perichianna Gounder (the appellants herein being his legal representatives) borrowing several sums of money. In the present appeal we are only concerned with the liability under the promissory note, Exhibit A-3, dated 27th June, 1950. Under Exhibit A-1 dated 1st March, 1949, Kaliammal borrowed from Perichianna a sum of Rs. 500 for litigation expenses. Under Exhibit A-2, dated 5th July, 1949, she borrowed a further sum of Rs. 2,000 for litigation expenses and education and maintenance expenses. On 27th June, 1950 she executed the promissory note in question, Exhibit A-3, for a sum of Rs. 4,000, Rs. 2,726 representing the amount due under the promissory notes, Exhibits A-1 and A-2 and the balance representing receipt in cash. She executed another promissory note, Exhibit A-4, dated 5th December, 1950, borrowing a sum of Rs. 1,000 for litigation and maintenance expenses. It may be mentioned here that all the promissory notes were registered.

Perichianna filed the suit, O.S. No. 243 of 1953, on the file of the Sub-Court, Coimbatore (O.S. No. 70 of 1956, Sub-Court, Erode) on 20th July, 1953 for recovery of Rs. 5,822-11-0 representing the principal amounts due under the two promissory notes, Exhibits A-3 and A-4 and interest thereon. So far as the loan due under the last promissory note, Exhibit A-4, was concerned, there was no question of limitation and the suit was decreed in all the Courts in respect thereof. As regards the claim under Exhibit A-3, the plaintiff relied upon an acknowledgment alleged to have been made by Kaliammal on 4th September, 1950, in I.A. No. 1892 of 1950, in O.S. No. 74 of 1948 aforesaid. The trial Court held that the averments in the affidavit were not sufficient to constitute a valid acknowledgment in law and so dismissed the suit on the ground of limitation. On appeal, the learned District Judge came to a contrary conclusion and decreed the suit. The defendant preferred S.A. No. 1076 of 1959 and Ramakrishnan, J., held that the averments in the affidavit of Kaliammal were very vague and indefinite and did not satisfy the requirements of a valid acknowledgment within the meaning of section 19 of the Indian Limitation Act. The Judge took the view that the suit was governed by Article 57 of the Limitation Act and was barred having been filed more than three years after the date of Exhibit A-3. Learned Counsel for the appellant did not canvass the correctness of the view taken by the learned Judge on the question of the sufficiency of the acknowledgment, with the result that the question of limitation has to be determined without any intervening acknowledgment.

From the judgment it appears that the main point that was debated before the learned Judge was whether the suit would be governed by Article 57, as contended by the defendant, or by Article 120, as contended by the plaintiffs. The learned Judge held that Article 116 of the Limitation Act which prescribes a period of six years in the case of registered documents would not apply in the view that the suit was not based upon the registered promissory note as such, but it was to enforce the right of subrogation and the claim for reimbursement of the guardian as against the estate of the quondam minor. With great respect to the learned Judge, we are unable to concur

with him as his view of the true scope and character of the suit and the nature of the reliefs prayed for therein is incorrect. If we may say so, that is partly due to the fact that Counsel on both sides readily assumed Article 116 had no application to the suit claim and focussed their attention only upon the applicability of Article 57 and Article 120.

To have a precise and correct idea of the true character and scope of the suit it is necessary to advert to the findings of the Courts below. The relevant portions in the plaint are :

(6) Kuttia Goundar died on 23rd September, 1947. After his death the will dated 11th September, 1944 became operative and Kaliammal took possession of the properties for and on behalf of the defendant and was in management. But some of the legatees, especially the testator's grandsons Krishnaswami Goundan and Venkataraya Goundan and their mother Pottaiyammal began to interfere with the minor's peaceful possession and enjoyment of the properties. Kaliammal resisted such interference. These actions resulted in various Criminal actions before Police and Magistrates. Further they created a usufructuary mortgage over all the properties covered under the will. They trespassed into some of the items and took forceful possession.

(7) On account of all these high handed actions of Krishnaswami Goundan and others with the help of some influential local people, Kaliammal had no option but to file a suit for the defendant's rights and peaceful enjoyment.

(8) Accordingly, she filed a suit in the Sub-Court, Coimbatore, in O.S. No. 74 of 1948, for declaration, injunction and for other reliefs. The properties allotted to the defendant were described in Schedule, E-1 and E-2 in that said suit. She also filed interlocutory application for interim injunction and for appointment of receiver. A receiver was appointed for the properties in Schedule E-1 in O.S. No. 74 of 1948. Receiver took possession of the said properties, leased them, realised the rent and deposited the rent in Court. The defendants 1 to 3 in the said O.S. No. 74 of 1948 were allowed to remain in possession of the properties described in Schedule E-2 on furnishing security for mesne profits. Thus Kaliammal was not getting anything out of the estate from Kuttia Goundar's death.

(9) The suits and the interlocutory applications are stoutly contested. There were other numerous collateral proceedings which were fought out in a number of Courts including the High Court. For these, Kaliammal had to incur an expenditure of Rs. 20,000. As her husband, the 4th defendant in the above suit O.S. No. 74 of 1948 fell out with Kaliammal immediately after filing the suit O.S. No. 74 of 1948 he was not helping her in any manner. On the other hand he colluded with other derendants in that suit.

(10) Kaliammal had to sel all her jewels and her own Stridhana property to meet the expenses of the litigation. She had to borrow for the necessary expenses of litigation from various persons including the plaintiff.

(12) On 20th June, 1950 she received a cash of Rs. 600 and on 27th June, 1950 she received a further cash (amount) of Rs. 674, from the plaintiff. Consolidating the above prior loans and also cash received as above, Kaliammal owed Rs. 4,000 to plaintiff on 27th June, 1950. In *evidence of the same, and as a collateral security she executed a registered promissory note for Rs. 4,000*. The said sums were borrowed for the litigation expenses as clearly..........................

....

(14) These litigations were necessary for recovering the properties from the trespassers and also for establishing the title of the defendant. But for the litigation the defendant would have lost most of the properties and would have been put to irreparable loss. The defendant was benefited by such litigations. Litigations were necessary and beneficial to defendant. Therefore *the debts borrowed by Kaliammal* are binding on the defendant and his estate and the defendant is liable to pay from out of his estate.

....

(16) Besides, if accounts were taken between the defendant and his mother Kaliammal, it would be found that she would be entitled to reimbursements to a very large amount than the suit claim. The plaintiff is also entitled to be subrogated to her right and recover the said amount from out of the suit amount. That Kaliammal, defendant's *mother who executed the pro-notes is now dead.*

....

(18) Thus the suit is filed on the original cause of action and the debts.

(19) As stated above the suit debts were borrowed from the plaintiff and *suit pro-notes were* executed at Puduvalliampalayam, hamlet of Kalingayam, Gobichettipalayam *and within the jurisdiction* of this Court.

....

(22) The cause of action for the suit arose on 1st March, 1949, 5th July, 1949, 20th June, 1950, 27th June, 1950 and on 5th July, 1949 at the Puduvalliampalayam, hamlet of Kalingayam village, Gobi taluk within the jurisdiction of this Honourable Court.

(23) The value of the suit for purposes of Court-fee and jurisdiction is Rs. 5,822-11-0.

Particulars of valuation.	Rs. As. Ps.
Principal amount *on the pronote dated 27th June*, 1950.	4,000-0-0.
Interest thereon at 5½% per annum from 27th June, 1950 to 20th July, 1963.	678-5-4.
Total.	4,678-5-4.

Court-fee payable thereon is Rs. 389-15-0.

	Rs. A. P.
Principal amount due under the debt evidenced by the pro-note dated 5th December, 1950.	1,000-0-0.
Interest thereon at 5½% per annum from 5th December, 1950 to 20th July, 1953	144-5-8
Total.	1154-5-8

Court-fee payable thereon is : Rs. 127-7-0

Total valuation is : Rs. 5,822-11-0

Total court-fee paid is : Rs. 517-6-0

It may be mentioned that Kaliammal was dead even at the time when the suit was filed. It is not disputed before us that the suit as framed embraces the creditor's claim or right to reach the minor's estate on the basis of the right of subrogation by stepping into the shoes of the guardian who will be entitled to a reimbursement from the estate in respect of moneys borrowed by her and utilised for the benefit of the estate. Even though some attempt was made in the trial Court to make out that Kaliammal will not be entitled to any claim of reimbursement from the minor's estate either on the ground of her mismanagement or on the ground that the moneys alleged to have been borrowed by her were not utilised for the benefits of the estate, the learned trial Judge had no hesitation in holding that there was absolutely no substance in this contention, and that Kaliammal was clearly entitled to a right of reimbursement from the defendant's estate. The trial Court found that she was taking every conceivable step for recovering possession of the property, that she conducted the litigation, that in connection with the expenses of the litigation and the maintenance and education expenses of the minor, she had to sell her jewels and also her stridhana properties. The learned trial Judge also adverted to the important fact that on account of the trespass and the obstructive attitude pursued by the enemies of the family, admittedly, upto the moment of her death, she did not and could not realise any income or profits from the defendants' estate, and that on a proper taking of accounts Kaliammal would undoubtedly be entitled to claim large sums of money by way of reimbursement. On appeal, the learned District Judge affirmed this view of the learned Subordinate Judge in view of the overwhelming documentary evidence and the admissions of the defendant himself. Indeed both before Ramakrishnan, J., and before us, Sri Rajah Iyer, the learned Counsel for the respondent did not canvass this finding that on a proper account taking Kaliammal would be entitled to recover large sums of money by way of reimbursement, at any rate, sufficient to cover the claim involved in the present litigation. Before we proceed further we may mention that no objection was raised that as Kaliammal was not a party to the suit, the creditor would not be entitled to work out the right of subrogation in the present suit. It is presumably due to the fact that Kaliammal was dead at the time of the suit and the defendant himself is her legal representative.

From the portions of the plaint extracted above, it will be clear that the plaintiff has filed the suit to work out the right of subrogation based upon the guardian's claim and right of reimbursement. It must be noticed that in such a suit all that the creditor has to aver and establish is that his claim against the guardian for moneys advanced is subsisting, alive, and had not been discharged by payment or otherwise and that as between the guardian and the minor the guardian would be entitled to a claim for reimbursement. It is true that if the creditor's claim against the guardian is either barred by limitation or for any reason unenforceable, the creditor cannot work out his right of subrogation merely because the guardian may have a well-founded claim for right of reimbursement. Equally, it is clear, that even though the creditors' claim against the guardian may be subsisting and alive the creditor cannot reach the estate if the guardian either on account of her mismanagement or wrongs committed by her is not entitled to a claim for reimbursement. In other words, the creditor must satisfy both the conditions concurrently, *i.e.*, (*a*) the claim of the creditor must be subsisting and enforceable against the guardian; (*b*) the guardian should be entitled to a right of reimbursement. If the true scope of the suit of the creditor in working out the right of subrogation is appreciated, it will be seen that the distinction between an action on the debt or on the original cause of action and an action on the promissory note is of no significance. It is unnecessary to refer to the

prior decisions dealing with the machinery and the nature of the suit for working out the right of subrogation of the guardian and as to whether the creditor can obtain relief against the minor's estate under the doctrine of indirect recourse in the very same suit or whether he should file two separate suits. The question is now concluded by the judgment of the Federal Court in *Sriramulu* v. *Pundarikakshayya*[1]. At page 226, Fasal Ali, J., put the matter thus at page 226 :

" There may, however, be cases in which the minor's needs have to be met and in such cases, the third principle enunciated by the Privy Council can come into play, that is to say, the manager or guardian can show that the estate ought to bear the burden which he had taken upon himself. In such cases, by the principle of subrogation, the creditor might be allowed to stand in the shoes of the guardian and invoke the latter's right to reimbursement out of the minor's estate. That right must usually be subject to the state of accounts between the guardian and his ward."

Mukherjea, J. has dealt with the same aspect in greater detail pointing out that there is no necessity for the creditor to file two suits and that he can obtain relief in the same suit. The matter was put thus at page 237-238 :

" When the guardian himself is a party to the contract in his capacity as guardian, a suit can certainly be instituted against him and a decree obtained. But simply because the defendant is sued in his capacity as guardian, the estate of the ward cannot be proceeded against in execution of the decree obtained in such suit. In order to bind the minor's estate, the minor must also be made a party to the suit properly represented. Now on what basis can a decree be made in such a suit making the minor's estate liable for the money borrowed by the guardian ? The minor being incapable of being a party to a contract there could be no direct contractual liability established against him or his estate. But as the guardian was personally liable under the contract, he would be entitled to reimbursement from the minor's estate under the rule of Hindu Law if the borrowing was for necessity or benefit of the minor. The creditor in such circumstances can invoke the equitable doctrine of subrogation in his favour and claim to be placed in the position of the guardian for enforcement of the latter's right of reimbursement against the minor's estate. Instead of there being two suits, one by the creditor against the guardian and the other by the *guardian against the minor both the reliefs may be worked out in one and the same suit and thereby multiplicity of litigation could be avoided.*

This is the only proper way in which the Hindu Law rights of the guardian in the matter of contractual debts for necessity or benefit of the minor could be given effect to in perfect consonance with the well-established principles of the law of contract and the ordinary rules of procedure in personal actions. The application of this rule would be just and equitable to the minor also. As the creditor stands only in the shoes of the guardian and can claim the rights of indemnity which the latter can assert against the minor's property, it would be open to the minor to show that the guardian himself was in default and would not be entitled to any indemnity if accounts were properly taken.

....

When the guardian is the maker of the note and he excludes his personal liability, no suit, in my opinion, could be instituted either against the guardian or the infant as explained above ; whether a suit would lie on the original consideration is another matter, and if it could be brought, the same principles would apply. The position therefore is that in case of contractual debts borrowed either on simple bonds or promissory notes the creditor can have recourse to the minor's estate indirectly on the principle of subrogation, when the guardian has the right of indemnity against the estate of the ward ; and he would have the right of direct reimbursement out of the properties of the infant, only when the debt is for necessaries supplied to the infant. In this way can effect be given to the personal law of the Hindus in respect of the liability of a minor's estate for debt contracted by the guardian for legal necessity without infringing in any way the basic principles of the law of contract, and in this way alone, the different pronouncements of the Judicial Committee mentioned above can be consistently explained."

We shall now take up the question of limitation. In determining the particular article applicable to a suit, the language of the third column of the articles should be so interpreted as to effectuate the intention of the Legislature, *i.e.*, by dating the cause of action from a date when the remedy is available to the party. In construing the relevant articles undue stress should not be laid on the first column and the third column should not be ignored, with the result that if in a particular case the facts come under the first column of a particular article but the third column, *i.e.*, the starting point of limitation under the circumstances, is inapplicable that article should be altogether rejected. Any construction which would result in time commencing to run against a party even before the right to sue has accrued in his favour should be avoided, as such a construction would result in obvious injustice and absurdities. A proper appreciation of the basis of the legal rights, on which relief is sought for, will be very helpful in determining the relevant article applicable to the suit.

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1. (1950) 1 M.L.J. 586 : (1949) F.L.J. 288 : A.I.R. 1949 F.C. 218.

We shall now take up the question as to how far Article 57 would be applicable to a creditor's suit against the estate. If the creditor elects to file two suits, one against the guardian in the first instance for obtaining a decree against the guardian and also a declaration that he is entitled to be subrogated to the rights of reimbursement of the guardian and later on files the second suit to obtain satisfaction against the estate represented by the minor based upon such a declaration, it is obvious that Article 57 cannot apply to the second suit. The creditor's cause of action in working out the right of subrogation is a separate cause of action springing from and resting upon the declaration passed in the earlier suit. To such a situation it is impossible to apply Column 3 of Article 57. When the creditor works out the right of subrogation in the second suit, the suit may be regarded as in substance for the relief of money payable for money lent, governed by Column 1 of Article 57. But as observed earlier Column 3 cannot possibly apply as the right to sue itself accrued to the creditor not on the date of the loan but only on the date when his right of subrogation was declared. To such a claim Article 120 alone will apply, there being no other specific article.

The question next arises regarding a suit in which the creditor combines both the reliefs, the claim against the guardian as well as the relief of subrogation against the minor's estate, like the instant case. In our opinion, the matter does not admit of any doubt whatsoever and the only article applicable will be the article which would apply to a suit against the guardian. There cannot be two periods of limitation for that suit merely because the creditor has combined both the reliefs in the same suit. A creditor cannot invoke the larger period of limitation under Article 120 because he has also claimed the right of subrogation. It must be borne in mind that this right can be worked out only if the creditor's claim against the guardian is in time. Even though the matter was not considered from this perspective before Ramakrishnan, J., Mr. Rajah Iyer, learned Counsel, accepted before us that this is the correct legal position. But he, however, contended that when a creditor takes a registered promissory note from the guardian it is open to him either to file a suit on the registered promissory note within a period of six years under Article 116, or file a suit on the original cause of action on the loan within three years under Article 57. He urged that in this case the creditor has elected to follow the latter course of suing on the debt so as to be governed by Article 57. We are unable to accept this contention. We are clearly of the opinion, on a reading of the plaint, that the creditor is enforcing his claim under the registered promissory note and has not elected to sue upon the alternative cause of action, *i.e.*, the debt. Paragraph 12 of the plaint contains specific reference to the promissory note. Paragraph 14 states that the debts borrowed by the guardian are binding upon the defendant. Paragraph 16 again contains reference to the promissory note. Paragraph 19 refers to the execution of the promissory notes in the village of Puduvalliampalayam for the purpose of jurisdiction of the Sub-Court of Coimbatore. Paragraph 22 dealing with the cause of action refers to the date of the registered promissory note. Above all, paragraph 23 containing the particulars of valuation specifically refers to the promissory note and leaves no room for any doubt in the matter.

Learned Counsel, Mr. Rajah Iyer, relied upon paragraph 18, where it is stated that the suit is filed on the original cause of action and the debt. But this paragraph should be read in the light of the other portions of the plaint referred to above which clearly show that the creditor is seeking relief with particular reference to his claim under the promissory note executed by the guardian. The averment in paragraph 18 is made only to emphasise that the creditor is working out his right of subrogation. There is no conceivable reason as to why a creditor should give up his rights under the registered promissory note when he has got a larger period of limitation and be content to sue on the debt which would be barred by limitation. Reading the plaint as a whole, we see no basis, whatsoever, for holding that the creditor has elected to abandon his rights under the registered promissory note.

For all the above reasons we hold that the suit is governed by Article 116 and is well within time. The appeal is allowed and suit decreed with costs in all the Courts.

Even though we are awarding relief to the plaintiff on an aspect not presented before the learned Judge, we think that this is a case in which the defendant should be directed to pay the costs of the appellants in all the Courts, as he has raised all kinds of false and dishonest pleas, besides exhibiting gross ingratitude for all the timely financial help rendered by the plaintiff at critical times.

P.R.N. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction.)

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

The Management of United Bleachers (Private), Limited, Mettupalayam .. *Appellant**

v.

The Presiding Officer, Labour Court, Coimbatore and another .. *Respondents.*

Constitution of India (1950), *Article* 226—Certiorari—*Power of High Court to take notice of facts not appearing on face of record.*

Industrial dispute—Delay on part of workers or union to raise dispute—Employer raising specific plea of laches—Labour Court not dealing with same—Power of Court to consider question of laches on facts outside record and to grant relief irrespective of laches and to direct payment of back pay up to time of raising of dispute.

Industrial dispute—Laches—Delay on part of workers or union to raise dispute—Relevancy in considering relief to be granted—Function of Labour Court.

The High Court, in *certiorari* proceedings, cannot take notice of any fact which does not appear on the face of the order sought to be quashed. Where in an Award of the Labour Court under the Industrial Disputes Act there is no specific treatment of a question of laches on the part of the workers in raising a dispute, though the employers in their statement before the Labour Court specifically pleaded that the delay and laches on the part of the workers and the union in raising the dispute disentitled the workers to any relief, it is not within the jurisdiction of the High Court in *certiorari* proceedings to dispose of that ground on facts outside the award itself and not specifically adverted to therein. It is the Labour Court that has to be directed to deal with that point upon the merits.

Unreasonable and unjustifiable delay in raising dispute would no doubt be a relevant factor for the consideration of the Court and might even entitle the Court to decline relief altogether ; but the mere circumstance that the workmen did not raise a dispute for a long time cannot be a sufficient ground for declining relief. The true position is that while the time that subsequently elapses, once the industrial dispute has been raised, would, of course, be quite irrelevant on the consideration of relief the delay that might have occurred between the occasion for the dispute and the agitation or complaint by labour which leads to the reference would be a relevant circumstance in shaping the relief. Everything would depend on the period of delay, the facts which occasioned the delay and the degree of negligence with which organised labour could be rightly taxed. But that is entirely a matter for the Labour Court to decide, upon the facts, and in the light of the guiding principles governing the matter. When this ground was raised in the averments of the record, but the Labour Court did not deal with this ground, the High Court has really no jurisdiction to proceed with it in a matter of *certiorari*, and to hold that laches did not disentitle the concerned party to relief or to direct payment of back wages up to the time that the dispute was raised, as that is a matter primarily for the decision of the Labour Court.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Veeraswami, dated 21st April, 1964, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 129 of 1962, presented under Article 226 of the Constitution of India, to issue a Writ of *certiorari* calling for the records relating to the award dated 8th December, 1961, in I.D. No. 41 of 1961 on the file of the Labour Court, Coimbatore, and published in Supplement to Part II, Section 1 of the *Fort St. George Gazette*, dated 27th December, 1961, and printed at pages 5 to 7 thereof and quash the said award.

V. Tyagarajan, for Appellant.

B. R. Dolia, for Respondent.

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* W.A. No. 250 of 1964. 27th January, 1965.

The Order of the Court was pronounced by

Anantanarayanan, O.C.J.—This is an appeal instituted by the Management of United Bleachers (Private), Limited, Mettupalayam, from the judgment of Veeraswami, J., in W.P. No. 129 of 1962, which itself was a proceeding for the issue of a writ of *certiorari*, quashing the award in Industrial Dispute No. 41 of 1961 on the file of the Labour Court, Coimbatore. The facts have to be set forth, first, with some precision and care, for a proper appreciation of the true scope of the controversy before us. For the purpose of the disposal of this appeal, we are segregating certain essential facts alone for notice, and disregarding others. One P. Krishnan, employed as a workman in the organisation of the appellant institution, in a particular capacity of a Supervisor of a shift, in the Stitching Department, was informed by a letter of the Management, dated 3rd October, 1957, that his post was abolished. This was in consequence of a decision by the Management to work both stitching machines during the day-shift, to abolish the night-shift. In order to lessen the hardship to the worker, he was offered an alternative job of a Helper in the same department, admittedly, a different and lower category. On 8th October, 1957, the Management terminated the services of another worker C. Krishnan, in the lower category, so as to provide P. Krishnan with the employment offered. P. Krishnan declined, on 9th October, 1957, to leave his post of Supervisor in the Stitching Section, and to work as a Helper. He also declined, according to the Management, to receive a 'show cause' notice for alleged misconduct. He was then dismissed from service, and a dispute was raised on this issue, which was the subject-matter of a proceeding before the Labour Court. It ended in an award dated 10th March, 1958, directing P. Krishnan to be reinstated in service.

Meanwhile, the workers comprising the Union had taken up the question of the retrenchment of C. Krishnan, in the inferior category of Helper, on the ground that this was not justified. That separate industrial dispute also ended in favour of the contention of Labour, and the Labour Court gave an award to that effect, dated 15th May, 1958. According to the Management, they then found themselves in a real difficulty in implementing the two awards, because the cumulative effect of the awards was that the Management could not offer the post of the Helper to P. Krishnan, but had to retain or reinstate C. Krishnan, while the Management was compelled to continue P. Krishnan as a Supervisor in the Stitching Section, according to them, a post which ought to be retrenched in the interests of economy. Some correspondence followed, into the details of which we need not here enter. One matter stands clear, and that is that the award of the Labour Court with regard to P. Krishnan was not implemented, according to the contention of Labour (I.D. No. 1 of 1958), and that there were certain proceedings in consequence, a prosecution of the Management under a relevant section of law, in the Court of the District Magistrate, Coimbatore. They resulted in a conviction; but, on an appeal to the District and Sessions Judge, the Management was acquitted; throughout, the claim of the Management was that there was no intentional failure to implement the award. On 25th September, 1958, the Management dismissed a large number of workers of the establishment for alleged participation in a strike, and that gave rise to a third industrial dispute, I.D. No. 69 of 1958. That culminated in certain writ proceedings, and a pending writ appeal. According to the case of the Union, the delay in making the reference by the State Government, in the present industrial dispute, was on account of these circumstances; as we shall see later, the question of delay is one of the relevant facts in the present proceedings.

The Labour Court held, by the award which was the subject of the Writ Petition before the learned Judge (Veeraswami, J.), that the dismissal of P. Krishnan, whose case alone now concerns us, was wrongful for failure of the Management to observe the provisions of section 25-G of the Act, which relate to the principle of retrenchment that the last to come, or to be employed, must be the first to go, and that retrenchment can only be in that order. We might here conveniently note that the Management attempted to raise the argument that every separate section of Super-

visors in the Stitching Establishment should be considered as an independent category, in which case the retrenchment of P. Krishnan could be technically justified. The Labour Court specifically overruled this contention, and came to the conclusion that the dismissal of P. Krishnan was wrongful. But, curiously enough, the logical consequence of this conclusion was not embodied in the award, owing to one circumstance. It appears that, during proceedings in the Labour Court, there was an admission by P. Krishnan, or at least, a concession, that he would be willing to be employed as a Helper in the inferior category, even if he could not be reinstated in the grade of Supervisor; the Labour Court hence directed the reinstatement of P. Krishnan in the category of Helper.

In substance, Veeraswami, J., held,—and, if we may say so with respect, justifiably on the record—that there could be no reinstatement of P. Krishnan directed, with regard to the inferior category of Helper. Actually, that would complicate matters a great deal, for, the vacancy in that category was created by the dispensation of the services of C. Krishnan, which has led to an independent industrial dispute, culminating in the award. Once the Labour Court held that P. Krishnan was wrongly dismissed with regard to the post of Supervisor, it followed that the erroneously retrenched employee would have to be reinstated in the post that he was occupying; the repercussions of that measure on other persons in the same grade, would have to be worked out, and cannot concern the Court. But, with regard to one important ground raised by the Management, *viz.*, that the laches and negligence of the worker or the Union in advancing this industrial dispute, constituted a factor for consideration of Court, entitling the Management to plead that, on that account, no relief should be given, the learned Judge overruled the argument, upon considerations which find no place in the award itself. It is pleaded by learned Counsel on behalf of the Management (Sri V. Tyagarajan) (1) that the question of laches is relevant and, not merely this, but an adequate factor under certain circumstances which will disentitle the worker to any relief; (2) that this ground was specifically put forward by the Management in their affidavit in the Labour Court; (3) that this ground has not been referred to by the Labour Court anywhere, in its award; (4) that, therefore, the learned Judge (Veeraswami, J.) was in error in referring to a matter which does not appeal *ex facie* in the award, in canvassing facts not comprised in the award, and in condoning the laches as a consequence; and (5) that, similarly, the learned Judge was in error in directing not merely the restoration of the worker in the category of Supervisor, but also the payment of the entire back wages: the contention is that, on the aspect of back wages, the factor of laches or delay will be crucial.

Per contra, learned Counsel for the Union, Mr. Dolia, argues that, on the strength of certain decisions which we shall immediately refer to, the aspect of laches or delay in making the reference cannot at all be relevant, and ought not to impede the Court in granting relief. The argument of learned Counsel is that delay occurred under circumstances of the criminal proceedings that we have earlier referred to, in the wake of the alleged failure of the Management to implement the earlier award. Not merely this; but there was also the matter of the dispensation of the services of a number of workmen for an alleged strike, and the agitation by organised labour in consequence. It is strenuously contended that, once, after the failure of conciliation, there is an industrial dispute raised by a reference made by the State Government under section 10, the question of anterior laches or delay cannot be canvassed at all. It was also contended that the learned Judge was not in error in traversing facts not strictly appearing in the record, for the purpose of dealing with this matter of laches or delay. Authorities are cited for the proposition that, once it has been held that retrenchment was wrongful and that section 25-G was infringed, this constitutes an abuse of the power of retrenchment, *mala fide* or as an " unfair trade practice," which would entitle the workman to reinstatement, irrespective of delay and whether the workman has found alternative employment elsewhere. We might briefly deal with the authorities on this aspect, to which our attention has been drawn, before finally disposing of the Writ

Appeal itself. In our view, the appeal seems to require only a certain clarification, in the light of the directions made by the learned Judge for reinstatement of the worker in the category of " Supervisor," and payment of back wages.

In *Vedachala Mudaliar* v. *Central Road Traffic Board, Madras*[1] a Bench of Rajamannar, C.J., and Satyanarayana Rao, J, held that it was well established that, in *certiorari*, the Court could not take notice of any fact, " which does not appear on the face of the order". The authorities cited for this decision are Halsbury's Laws of England, Volume IX, page 889, and *The King* v. *Liston*[2].

Certainly, we do not find in the award itself any specific treatment of the question of laches, though there is one somewhat oblique reference. Equally, we must accept the contention of the Management that, in paragraph 7 of the affidavit, the Management did submit that the delay and laches on the part of the Union in raising the dispute, disentitled the worker to any relief. Under those circumstances, this much at least seems clear to us that, unless it can be shown as a question of law that the ground of laches is altogether irrelevant, it is the Labour Court that must now be directed to deal with that objection, upon the merits ; the learned Judge could not really dispose of this ground on facts outside the award, itself, and not specifically adverted to therein.

Turning to decisions upon the question of the relevance of laches or delay, the first that may be cited is *Swadesamitran, Ltd.* v. *Their Workmen*[3]. That is also a decision cited by the Labour Court, and there is actually an extract from that judgment in the Award. The decision is authority for the view that, once it is found that retrenchment was unjustified and improper, the Court alone is clothed with the duty of shaping the necessary relief, such as reinstatement, irrespective of other considerations like the convenience of the employer, the fact that he has engaged other workmen who might be affected, the lengthy nature of the litigation in regard to the dispute, or the fact that the workman himself has been employed elsewhere in the meantime. In *Shalimar Works, Ltd.* v. *Its Workmen*[4], we have what would appear to be a converse case of relief declined on the ground that the industrial dispute relating to non-employment of certain dismissed workmen was referred for adjudication after a lapse of four years, without specifying the names of the concerned workmen ; but, indisputably, the facts appear to be quite special, and it is difficult to spell out any general proposition of law from the case. All that can be said is that, under such circumstances of unreasonable and unjustified delay in raising the dispute, that would be a relevant factor for the consideration of Court, and might even entitle the Court to decline relief altogether. The last case is *Bombay Gas Co.* v. *Gopal Bhiva*[5]. That case really relates to section 33 (*c*) (2) of the Act, and it makes a distinction between a claim under that provision of law, and other claims like a claim for bonus. Where a claim under section 33 (*c*) (2) is in question, which was based in the case on an Award and intended as a mere execution of that Award, their Lordships of the Supreme Court held that limitation cannot be introduced as a factor disentitling relief, on any academic ground of social justice. If limitation is to enter into the picture at all, it could only be by legislative enactment. The dicta in *Management of Chandramalai Estate* v. *Its Workmen*[6] are also relevant here, for, the Supreme Court held, on the facts of that case, that the mere circumstance that the workman did not raise a dispute till 1955, though the arrears of allowance related to the period 1949 to 1953, was not a sufficient ground for declining relief.

It appears to us that an analysis of these decisions leads to the conclusion that, while the time that subsequently elapses, once the industrial dispute has been raised, would, of course, be quite irrelevant in the consideration of relief, the delay that

1. (1948) 1 M.L.J. 322 at 326.
2. 101 E.R. 189.
3. (1960) S.C.J. 658 : (1960) 3 S.C.R. 144 : (1960) 1 L.L.J. 504.
4. (1959) 2 M.L.J. 26.
5. (1963) 2 L.L.J. 608.
6. (1960) 3 S.C.R. 451 : A.I.R. 1960 S.C. 902.

might have occurred between occasion for the dispute, and the agitation or complaint by labour which leads to the reference, might be one relevant circumstance in shaping relief. For instance, it would have an obvious and indisputable significance with regard to the matter of the period for which the worker, even if the Management is to be directed to reinstate him, might be entitled to back wages. But, while the ground of delay is relevant, there are decisions of the Supreme Court wherein delay *per se* has not been held to be any adequate ground for declining relief, particularly where the dismissal or retrenchment is illegal, and, therefore, amounts to an ' unfair trade practice'. But it is clear that everything will depend on the period of delay, the facts which occasioned the delay, and the degree of negligence with which organised labour could be rightly taxed. We agree that this is entirely a matter for the Labour Court to decide, upon the facts, and in the light of the guiding principles to be found in the authorities. When the ground was raised in the averments of the record, and the Labour Court did not deal with the ground, this Court would really have no jurisdiction to proceed with it in a matter of *certiorari*, and to hold that laches did not disentitle the concerned party to relief. Equally, the direction with regard to payment of back wages up to the time that the dispute was raised, would have to be set aside, as that is a matter primarily for the decision of the Labour Court.

Under the circumstances, we dismiss the appeal, subject to certain modifications of the directions in the judgment of Veeraswami, J. The finding that the retrenchment is illegal will stand. The relief of reinstatement has necessarily to be considered with regard to the post from which the worker was retrenched, namely, of Supervisor in the concerned category. The claim for back wages cannot be questioned, on the ground that the concerned worker was employed elsewhere, or was engaged in other business during the period of his non-employment, for, we find that evidence was adduced, and there is a specific conclusion of fact of the Labour Court on that aspect. In the release of the proceedings occasioned by the judgment of the learned Judge, the parties will not be entitled to file any additional pleadings ; but they will be entitled to adduce additional evidence, if desired. The question of back wages will have to be confined to the period from the date of the discharge of the worker till the date on which the dispute was raised by the Union ; with regard to the subsequent period, there is really no room for controversy. The question whether there was delay or laches on the part of organised labour,—and whether this would disentitle the concerned worker to the relief either of reinstatement or of back wages or of both—must be left to the decision of the Labour Court, upon the facts on record, and the principles applicable, as set forth in the authorities of the available case-law. We have already referred to certain of the decisions cited before us. The appeal is accordingly allowed in part.

The amount of Rs. 2,250 paid to the worker towards back wages, under directions of this Court *pendente lite*, will abide the ultimate decision of the Labour Court, and its award as to any liability for repayment.

P.R.N. — *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE K. SRINIVASAN.

U. Vridhachalam (died) and others .. *Petitioners* *

v.

State of Madras represented by the Secretary to Government, Home Department, Madras .. *Respondent.*

Constitution of India (1950), Article 226—Dismissal of petitioner on departmental enquiry—Writ of certiorari *—Death of petitioner—Legal representative, not entitled to continue the writ.*

* W.P. No. 863 of 1961. 14th April, 1965.

Where the issue of a writ was sought only to quash the order of dismissal and restoration of the petitioner to his rights in the service of the State, it is only a personal right of the petitioner, that is sought to be ventilated and therefore if the petitioner is no longer alive to avail himself of the benefits of the remedy, the legal representative of the petitioner cannot continue the writ.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be lpeased to issue a writ of *certiorari* calling for the records in G.O. Ms. No. 1311, dated 19th April, 1960 of the Government of Madras confirming the proceedings in P.R. No. 279 of 1958 dated 30th December, 1958 of the Suprintendent of Police, Tiruchirapalli and quash the order, and made therein.

S. Mohan, for Petitioner.

K. S. Bakthavatsalam for the Additional Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—The petitioner, since deceased, was a Police Head Constable against whom certain charges were framed. A departmental enquiry thereinto resulted in an order of dismissal from service. The petitioner, after exhausting his remedies by way of appeal, came to this Court seeking the issue of writ of *certiorari* on certain grounds which it is unnecessary to refer to. Since filing the petition, he died and his legal representatives have come on record.

The preliminary question arises whether the writ proceedings are maintainable in the circumstances of the case. It is contended by the learned Counsel appearing for the State that any order that can be made in this case is of an interest personal only to the dismissed officer, and that since the legal representatives can claim no personal right, they cannot agitate the question. On behalf of the petitioners, Mr. Mohan urges that this being an application for the issue of writ of *certiorari* what is sought is only to have the offending record removed. Reference has been made to *Basappa* v. *Nagappa*[1]. Dealing with the features of a writ of *certiorari*, their Lordships of the Supreme Court point out that it can be availed of to remove or adjudicate on the validity of judicial acts, which includes the exercise of quasi-judicial functions by administrative bodies or authorities. Another feature is that the control by way of a writ of *certiorari* is exercised over judicial or quasi-judicial tribunals not in an appellate but in a supervisory capacity. The superior Court only demolishes the order which it considers to be without jurisdiction or palpably erroneous. The offending order is put out of the way as one which should not be used to the detriment of any person. In *Hari Vishnu Kamath* v. *Syed Ahmed Ishaque*[2] where a question arose whether a writ could issue against a tribunal which had ceased to exist, their Lordships of the Supreme Court observe that a writ of *certiorari* is only directed against a record and that the fact that the tribunal which made the order became *functus officio* could not affect the jurisdiction of the Court to remove the record. Relying upon these decisions, learned Counsel for the petitioners argues that whether or not the petitioner, the dismissed officer, is dead can make no difference to the relief sought, *viz.*, that the order which is impugned should be quashed on grounds which are relevant to a proceeding in writ.

On behalf of the State, a decision of the Supreme Court in *Cal. Gas Company* v. *State of West Bengal*[3] has been relied upon. Dealing with Article 226, it is pointed out herein that it does not cover only the area of fundamental rights and that persons other than those claiming fundamental rights had also approached the High Court for relief under the Article. But it is emphasised that the exercise of the extraordinary jurisdiction in granting the relief must be one to enforce a legal right.

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1. (1955) S.C.R. 250.
2. (1955) S.C.J. 267 : (1955) 1 M.L.J. (S.C.) 157 : (1955) 1 S.C.R. 1104.
3. (1963) 1 S.C.J. 106.

The right sought to be enforced under that Article should ordinarily be a personal and individual right of the petitioner himself, though in the case of some writs like *habeas corpus* or *quo warranto* this rule may be relaxed. It is accordingly the contention of the State that since the issue of a writ as sought is only to quash the order of dismissal and restore him to his rights in the service of the State, it is a personal right that is sought to be ventilated and that therefore when the petitioner is no longer alive to avail himself of the benefits of the remedy, the writ cannot issue.

There is considerable force in the contention of the State. It may be noticed that the charges against the Head Constable included corruption. Assuming that the impugned order is quashed on the ground urged in the petition, *viz.*, that the procedure adopted by the authorities was opposed to the principles of natural justice, or that the rules governing the enquiry have not been followed, the position would be that the Department would be entitled to continue the proceedings afresh against the delinquent officer. What this Court does is only to vacate the impugned order. The charges that were framed against the delinquent officer do not stand wiped out by this proceeding. Now that the delinquent officer is dead, the Department cannot possibly recommence the proceedings against him. Mr. Mohan claims that if the dismissal of the officer is improper, then the legal representatives would be entitled to recover from the State such emoluments and other monetary benefits which the delinquent officer would have been entitled to during the period he was kept out of office. Mr. Mohan does not deny that the recovery of such emoluments would not follow as a matter of course by the issue of a writ in the present case. The legal representatives of the delinquent officer nevertheless have to file a suit. It is again doubtful whether the suit would be within the period of limitation, for the order of dismissal was made as long back as 1958. Whether that would be the operative date for computing the period of limitation or the date of the issue of rule by this Court is again a doubtful question. Mr. Mohan does not deny that if a suit is filed, in that suit it would have to be independently established that the petitioner was not guilty of anything that would justify his dismissal as a preliminary to obtaining any relief sought in that suit. It follows therefore that the issue of a writ is only sought as a step towards further legal steps which the legal representatives of the deceased officer propose to take.

I am not satisfied that in these circumstances this Court can entertain the writ petition. I am inclined to agree with the contentions of the State that the relief sought is purely personal to the delinquent officer and such personal right which really involves the continuance in service or otherwise of a person cannot survive to the legal representatives. The State also will be placed in a somewhat anomalous position in not being able to continue the proceedings against the officer even if the writ should be granted. Mr. Mohan does not deny that if the legal representatives are regarded as third parties, they cannot claim to seek the issue of a writ to displace the offending order, for unless the person has a legal right, he cannot seek the exercise of the extraordinary jurisdiction of this Court. I am accordingly satisfied that no relief can be granted to these petitioners in these proceedings.

The petition is dismissed, but there will be no order as to costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Mohamed Ismail, Khizer Hussain & Co. .. *Petitioner* *

v.

The State of Madras represented by the Secretary, Department of Industries, Labour and Co-operation, Fort St. George, Madras-9 and another .. *Respondents.*

Factories Act (*LXIII of* 1948), *section* 6—*Madras Factories Rules* (1950), *rule* 3—*Scope and applicability —Do not apply to existing factories.*

Section 6 of the Factories Act and rule 3 of the Factories Rules clearly apply only to factory buildings erected after the passing of the Factories Act or to reconstruction or remodelling of existing factory buildings after the coming into force of the Factories Act. They do not apply to existing factories which were existing prior to the passing of the Factories Act. A pre-existing factory cannot therefore be condemned by resort to section 6 and rule 3 on the ground that it does not conform to specifications prescribed under the Factories Act and the Rules made thereunder.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue a writ of *mandamus* directing the 2nd respondent to forbear from enforcing rule 3 of the Factories Rules, 1950 in respect of the petitioner's tannery building at No. 2, Punji Road, Ranipet and taking further proceedings against the petitioner in pursuance of the same.

K. Rajah Iyer for *B. T. Seshadri*, for Petitioner.

S. Mohan for the Additional Government Pleader, on behalf of Respondents.

The Court made the following

ORDER.—This is a petition under Article 226 praying for the issue of a writ of *mandamus* directing the Inspector of Factories not to enforce rule 3 of the Factories Rules in respect of the petitioner's tannery and take further proceedings against the petitioner in pursuance thereof. The facts are these. The petitioner has been carrying on the business of tanning hides and skins in certain premises from 1954. These very premises had been in use as a tannery for the last 35 years. In 1957 the then owner of the premises became an insolvent and the premises were purchased by the petitioner in insolvency proceedings. From 1954 onwards, therefore, the petitioner has been carrying on the business of tanning obtaining the necessary licences under the Factories Act. In December, 1957, the Assistant Inspector of Labour called the attention of the petitioner to section 6 of the Factories Act and rule 3 of the Factories Rules and asked the petitioner to submit a site plan, a plan of elevation and section of factory buildings for approval by the Chief Inspector of Factories. Such plans were furnished. The Inspector of Factories did not however approve the plan, stating that the minimum height of the wall should be 8 feet, while it was only 7½ feet and that certain thatched sheds, which formed part of the factory buildings, were objectionable. The petitioner pointed out that these buildings had been in use as a factory for the last 35 years, that they had not been erected or reconstructed or remodelled by the petitioner after the coming into force of the Factories Act. The petitioner prayed that the plans might be approved. He was however willing to remove the thatched sheds and it has been stated that these thatched sheds have since been removed. The petitioner's request was however not granted and the petitioner was informed by the Chief Inspector of Factories that if the plans were not submitted as required, prosecution would be initiated against the petitioner for contravention of the provisions cited earlier. The petitioner appealed to the Government and pointed out that the rule related only to new constructions or reconstruction or remodelling of existing factories and would not apply to a factory that had been in existence in its present state for several decades in the past. The appeal to the Government had no results. The

* Writ Petition No. 404 of 1962. 27th April, 1964.

petitioner thereafter informed the Inspector of Factories that the thatched sheds were being removed and with regard to the height of the wall claimed that as there was no reconstruction or alteration of the existing building, the plans might be approved as they stood. The Department however maintained its stand. A further appeal to the Government was rejected. On the failure of the petitioner to modify the building in the manner stated, the Inspector of Factories filed a complaint in the Court of the Sub-Divisional Magistrate for contravention of the provisions of the Factories Act.

The short contention advanced by the petitioner is that neither section 6 of the Act nor rule 3 of the Rules passed thereunder could apply to the instant case. The claim is that the rule-making power conferred by section 6 relates only to new factory buildings or the extention or modification of the old factory buildings and cannot apply to factory buildings which existed prior to the passing of the Factories Act, 1948. To apply the provision in the manner sought to be done by the Department virtually amounts to putting out of business numerous factories of this description. The fact that this building has been in use as a factory for several years is also referred to by the petitioner. It is again urged that rule 3 is so broadly worded that it confers what virtually amounts to an arbitrary power upon the authority to grant permission in one case or to refuse permission in another. This rule is also attacked as violative of Article 14.

The facts set out are not denied in the counter-affidavit of the respondent. It is only contended that the mere circumstance that the building had been in use as factory for 35 years or the delay in taking steps under the Factories Act cannot confer any right upon the petitioner to use the building as a factory in contravention of the provisions of the Act. It is claimed that rule 3 which gives the power to refuse or to give permission naturally requires examination of the plans with a view to see whether the building is in conformity with the requirements prescribed. Certain standards are said to have been prescribed in 1961. It is accordingly urged that the power conferred by rule 3 is not arbitrary as alleged.

The question really turns upon a proper interpretation of section 6 of the Act and rule 3 of the Factories Rules. Section 6 reads thus :

"*Approval, licensing and registration of factories.*—

(1) The State may make Rules—

(*a*) requiring previous permission in writing of the State Government or the Chief Inspector to be obtained for the site on which a factory is to be situated and for the construction or extenion of any factory or class or description of factories ;

(*b*) requiring for the purpose of considering applications for such permission the submission of plans and specifications;

(*c*) prescribing the nature of such plans and specifications and by whom they shall be certified ;

(*d*) ....

(*e*) ....

(2) ....

(3) Where the State Government or the Chief Inspector refuses to grant permission to the sites, construction or extension of a factory, or to the registration and licensing of a factory, the applicant may within thirty days of the date of such refusal appeal to the Central Government, if the decision appealed from was of the State Government, and to the State Government in any other case."

The rule-making power so conferred by this section finds expression in so far as that aspect is concerned in rule 3 of the Madras Factories Rules, 1950. This reads :—

"*Approval of site, construction or extension of a factory.*—

(1) No site shall be used for the location of a factory nor shall any building be constructed or reconstructed or extended for use as a factory, nor shall any manufacturing process be carried on in any building constructed, reconstructed or extended without the previous permission in writing of the Chief Inspector. The previous permission of the Chief Inspector shall also be obtained for the installation of additional machinery or for the installation of prime movers exceeding the horse power already installed in the factory."

The further parts of this rule deal with the nature of the plans that should be submitted for obtaining the permission indicated in rule 3 (1) above.

Both the section and the rule as they stand purport to deal with the construction of new factories. They start with the position that an approval has to be obtained in respect of the site on which the factory is to be situated. The section states that the previous permission has to be obtained for the site on which the factory is to be located. Equally the rule lays it down that no site shall be used for the location of a factory without the previous permission in writing of the Chief Inspector. Neither the section nor the rule thus appears to deal with the case where a factory is already in existence. The section does not apparently require that in the case of a factory which was in existence, the approval of the site should be sought after the coming into force of the Act. No provision in the Act has been shown to me which requires that even in the case of existing factories, by which term I mean factory buildings, which were in use prior to the passing of this Act, the approval with regard to the site should be taken. It is also not denied that even after the passing of the Act, the authorities concerned were granting licences to these buildings and permitted these buildings to be used as factory. It is seen that it was only in 1959 or 1961, it is not quite clear, that any specifications with regard to the nature of the construction were prescribed by the appropriate authorities. This fact is mentioned in the counter-affidavit in these terms :

> "In G.O. No. 3750, Industries, Labour and Co-operation, dated 22nd May, 1961, certain standards were laid down for buildings used for factories and in G.O. Ms. No. 834, Industries, Labour and Co-operation, dated 25th February, 1959, certain standards with special reference to tanneries have been prescribed."

It is clear therefore that it was not till 1959 that any specifications with regard to tanneries were at all prescribed. The question then is whether the pre-existing factories could be condemned by resort to section 6 and rule 3.

I am unable to read section 6 and rule 3 as conferring any such power upon the appropriate authority. The section in terms provides for the obtaining of a previous permission for the site on which the factory is to be situated and for the construction or extension of any factory. The submission of plans and specifications is intended only for that purpose. This section contemplates a position when the factory is to be erected in the future or an extension of an existing factory is contemplated. In so far as such extension is not in accord with any specifications prescribed, the concerned authority may refuse permission for such extension. But, where a factory had been in existence and no previous permission for the site or the construction of the factory was required, this section does not enable the appropriate authority to demand that the owner of the factory should obtain the approval of the appropriate authority for the site of the plans of the factory buildings.

The Department appears to have relied upon rule 3 which, while repeating the content of section 6, includes some further restrictions. The relevant part of the rule reads :

> " *Rule* 3.—*Approval of site construction or extension of factory.*—(1) No site shall be used for the location of a factory nor shall any building be constructed, reconstructed or extended for use as a factory, nor shall any manufacturing process be carried on in any building constructed, reconstructed or extended without the previous permission in writing of the Chief Inspector........."

The Department seems to claim that the latter part of this rule, which prohibits any manufacturing process being carried on in any building constructed without the previous permission in writing of the Chief Inspector covers the present case. But the previous permission that is contemplated by this part of the rule relates to a case where the factory itself is constructed after the coming into force of this Act and the Rules. This rule cannot go beyond the scope of the Act itself and unless the Act enjoins a prohibition against the continued existence of factories, such factories like the present one, the rule cannot be invoked for the purpose. It would be recalled that even the specifications with regard to the building appear to have been prescribed only as late as in 1959. How they could be made applicable to

factories which had been in existence for decades in the past I am unable to see. According to the Department, the required minimum height of the roof is said to be 8 feet, while the petitioner factory's premises has a roof of a height of only 7½ feet. If the requirement is absolute and the factory cannot run unless its roof is raised to that height, it means that the factory will have to be demolished and rebuilt. It may be that this minimum height was required to safeguard the health of the workers. But I am at a loss to imagine how a rule so lately introduced can be enforced against establishments which had all along been carried on with the permission of the authorities. Both the section and the rule clearly apply only to factories that are to come into existence in the future and their application to existing factories is not contemplated.

I am aware that such specifications as have been prescribed are intended for the benefit of the workers. It may be open to the authorities to refuse a licence for the working of the factory or it may be open to them to demand that instead of demolishing the building and raising the height of the roof, such additional amenities as larger windows or the like, should be provided. But what I am unable to agree with is that by resort to section 6 and rule 3 the Department can prevent the working of the factory. That section and that rule do not confer that power sought to be exercised in the present case.

It follows that the petition succeeds. The rule is made absolute. There will however be no order as to costs.

V.K. — *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Chandra .. *Petitioner* *

v.

Accommodation Deputy Tahsildar, Office of the Accommodation Controller, Mount Road, Madras-2 .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (*XVIII of* 1960), *sections* 3 (1), (3), (5) *and* 33—*Power to requisition building under section* 3 (3)—*Cannot be exercised before receipt of vacancy notice from landlord—Scope of section* 3 (5)—*Requisition under section* 3 (3) *before receipt of vacancy notice—Landlord failing to deliver possession—If guilty of contravention of section* 3 (5)—*Letters to Accommodation Controller to release building for personal occupation of landlord—Accommodation Controller failing to take action—Effect.*

Under section 3 (1) of the Madras Buildings (Lease and Rent Control) Act the landlord is enjoined to give notice of vacancy within seven days after the building becomes vacant. The notice contemplated is to be given after the building becomes vacant and within seven days from the date after the building becomes vacant. Section 3 (3) empowers the Government or the authorised officer to intimate to the landlord that the building is required for Governmental purposes within seven days of the receipt of the notice given by the landlord under section 3 (1). The exercise of power under sub-section (3) arises only after the receipt of notice under sub-section (1). Thus the power to requisition the house arises only after the receipt of the notice of vacancy from the landlord. Sub-section (5) of section 3—which provides that if the building is required for any of the purposes of section 3 (3), the landlord shall deliver possession of the building in good tenantable repairs and condition to the authorised officer or the allottee named by him—is not an independent provision but is subject to sub-sections (1) and (3) of section 3 and any action under sub-section (5) can only be in furtherance of sub-section (3).

Where, therefore, a day prior to the building falling vacant and before notice of vacancy was received from the landlord the Accommodation Controller acting under section 3 (3) intimated to the landlord that the building was required for Governmental purposes and called upon him to deliver vacant possession of the same in good tenantable condition in accordance with the provisions of section 3 (5) and the landlord failed to do so ;

Held, the action of the Accommodation Controller in taking proceedings under section 3 (3) before he received a notice of vacancy from the landlord was not in accordance with law. The landlord was not therefore guilty of contravention of the provisions of section 3 (5) and hence was not punishable under section 33 of the Madras Buildings (Lease and Rent Control) Act.

The only provision under which a landlord can get a building for his own occupation is section 29 under which he can apply for exemption to the Government. The Accommodation Controller is

* Criminal Revision Case No. 259 of 1964 (Criminal Revision Petition No. 254 of 1964). — 18th January, 1965.

not empowered under the Madras Buildings (Lease and Rent Control) Act to release a house for the own use of the landlord. Where, therefore, the landlord without applying for exemption of his building under section 29 merely writes letters to the Accommodation Controller requesting him to release the building for his own occupation, the failure of the Accommodation Controller to take action on the letters of the landlord cannot be said to be in breach of any statutory duty cast on him and the landlord cannot have any legal grievance.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the Fifth Presidency Magistrate, Egmore, Madras dated 7th November, 1963 and made in C.C. No. 13054 of 1963.

N. Govindan and *K. N. Sitamsukumar*, for Petitioner.

K. A. Panchapakesan for Public Prosecutor, on behalf of State.

The Court made the following

ORDER.—This is a revision by the landlady against her conviction under section 3 (5) read with section 33 of the Madras Buildings (Lease and Rent Control) Act, 1960 and a fine of Rs. 200 imposed on her by the Fifth Presidency Magistrate, Egmore. The house in question is No. 4, Casa Major Road, Egmore. The tenant Komathi Ammal who was in occupation informed Chellammal, the mother of the petitioner herein, that she would be vacating the house on 26th February, 1963 by Exhibit P-1 dated 12th February, 1963. The Accommodation Controller coming to know that the premises was likely to fall vacant issued Exhibit P-2 dated 14th February, 1963 calling upon Chellammal to give vacancy report as required under section 3 (1) of the Act as soon as the building fell vacant. On 19th February, 1963, Chellammal and the petitioner wrote to the Accommodation Controller Exhibit P-3 acknowledging Exhibit P-2. In that letter it was stated that the premises belonged to the petitioner under a settlement deed executed in her favour by her father, that out of the several houses given to the petitioner, the premises No. 4, Casa Major Road was the biggest and the best, that as the petitioner's marriage was being arranged, she required separate residence for her and that, therefore, the premises No. 4, Casa Major Road, should be released to her. On 21st February, 1963 by (Exhibit P-4), the Accommodation Controller issued an offering notice stating that the premises was vacant and calling upon the officers who were interested in occupying the house to inspect the house and give their consent if they were satisfied with the building and wanted it for their occupation. On 27th February, 1963 by Exhibit P-5 the Accommodation Controller passed an order under section 3 (3) of the Act informing the petitioner that the premises was required for Governmental purposes and that the premises should not be occupied by the landlady or let out to any person but should be handed over to the allottee or to the person authorised by the Accommodation Controller. On the same day, the petitioner wrote Exhibit P-3, stating that the tenant Komathi Ammal had not so far given vacant possession of the building and that she was under the impression that she could send the vacancy report after taking possession of the house. It also referred to her request for the release of the building for her own occupation. Pending decision on her request, she also prayed that the house should not be allotted to anyone. On 28th February, 1963 the premises fell vacant and on 3rd March, 1963 the petitioner gave vacancy notice Exhibit D-5. The petitioner also stated that the house was in a very bad condition and required repairs. Again the petitioner reiterated her request for release of the building for her own use. On 6th March, 1963, the Accommodation Controller served a notice Exhibit P-8 through a special messenger. In that letter the Accommodation Controller informed the petitioner that the premises was taken over under section 3 (3) of the Madras Buildings (Lease and Rent Control) Act. It also referred to his statement that the premises was required for Governmental purposes and that vacant possession should be handed over to the person authorised by the Accommodation Controller. He invited the attention of the petitioner to section 3 (5) of the Act and stated that it had been brought to his notice that the flooring had been dug up and renewed from the front verandah of the house and that the act was highly irregular and in contravention of the provisions of the Act. The petitioner was called upon to restore the building to its original condition

and hand over the same to the Accommodation Deputy Tahsildar on or before 12th March, 1963. The petitioner was also informed that if she failed to do so, she would be prosecuted under section 33 of the Act. On the same date, under Exhibit P-6 the Government allotted the premises to an I.A.S. Officer as a special case. On 11th March, 1963 under Exhibit P-9 the petitioner wrote to the Accommodation Controller stating that she had been acting in conformity with the law and that she had given notice within seven days of the building falling vacant. She also stated that as the repairs were being carried on, it would take some time to put the building in good tenantable condition. In the circumstances, she submitted that it was unnecessary and even unfair to threaten her with prosecution. On 20th March, 1963, the Government by Exhibit P-10 approved the action of the Accommodation Controller in calling upon the landlady to restore the premises to its original condition.

On the facts stated above, it has to be determined whether the petitioner has contravened section 3 (5) of the Act.

Section 3 (1) (*a*) (i) of the Act provides that every landlord shall, within seven days after the building becomes vacant by the termination of tenancy, give notice of the vacancy in writing to the officer authorized in that behalf by the Government. The tenant also is required to give notice within seven days after the building, becomes vacant in writing to the officer authorised by the Government. Section 3 (3) provides that if, within seven days of the receipt by the authorised officer of a notice of vacancy by the landlord under sub-section (1), the Government or the authorised officer does not intimate to the landlord in writing that the building is required for the purposes of the State or Central Government or of any local authority or of any public institution or for the occupation of any officer of such Government, the landlord shall be at liberty to let the building to any tenant or to occupy it himself. Sub-section (4) of section 3 provides that when the landlord gives intimation under sub-section (1), he shall not let the building to a tenant or occupy it himself before the expiry of the period of seven days from the receipt of the notice. Sub-section (5) provides that if the building is required for the purposes mentioned in sub-section (3), the landlord shall deliver possession of the building in good tenantable repairs and condition to the authorised officer or to the allottee named by the authorised officer and the tenancy will commence from the date on which the authorised officer received notice from the landlord.

Thus it will be seen that, on a reading of sub-sections (1), (3), (4) and (5) of section 3, it is enjoined on the landlord to give notice of vacancy within seven days after the building becomes vacant. It may be noted that the notice contemplated is to be given after the building becomes vacant and within seven days from the date after the building becomes vacant. Sub-section (3) of section 3 empowers the Government or the authorized officer to intimate to the landlord that the building is required for Governmental purposes within seven days of the receipt of the notice given by the landlord under sub-section (1). The exercise of power under sub-section (3) arises only after the receipt of notice under sub-section (1). Thus the power to requisition the house arises only after the receipt of the notice of vacancy from the landlord which should be within seven days after the building becomes vacant. The landlord also is prohibited from occupying it himself or letting it to any one until the expiry of seven days specified in section 3 (3) of the Act and under sub-section (5) the landlord is further required to deliver possession to the authorised officer or to an allottee by him.

In this case, it is admitted that the building fell vacant only on 28th February, 1963 and the landlady informed the Accommodation Controller under Exhibit D-5 on 3rd March, 1963 about the vacancy. Therefore under section 3 (3) of the Act the Accommodation Controller will be entitled to requisition the building for Governmental purposes before 10th March, 1963. What happened in this case was, the Accommodation Controller coming to know that the building was likely to fall vacant by the end of February, 1963 called upon the landlady by Exhibit P-2 on 14th February, 1963 to give vacancy notice and again under Exhibit P-4

dated 21st February, 1963 notified to the officers that the premises was vacant and informed them that they could inspect the premises and notify their consent. The requisition was made by his letter Exhibit P-5 dated 27th February, 1963 in the exercise of the power vested in him under section 3 (3) of the Act as the building was required for Governmental purposes. It was stated that the building should not be occupied by the landlady. Exhibit P-5 is admittedly not in accordance with sub-section (3) of the Act for the building fell vacant only on the next day namely 28th February, 1965, and the vacancy notice which, under section 3 (1), is to be given by the landlord after the building fell vacant, was to be given only before 7th March, 1963. Only on receipt of the vacancy notice under section 3 (1), the Accommodation Controller is empowered to requisition the building within seven days of the receipt of the notice. Therefore when Exhibit P-5 was passed on 27th February, 1963 notifying that the building was required for Governmental purposes, the Accommodation Controller was not legally entitled to do so, as the building had not fallen vacant and as the notice under section 3 (1) had not been given. In the complaint preferred by the Accommodation Deputy Tahsildar, it was mentioned that the accused (landlady) notified the vacancy to the authorized officer by her letter dated 21st February, 1963, that the premises was notified to Government official on 21st February, 1963 and that it was taken over under section 3 (3) of the Act on 27th February, 1963. It was also alleged that before the orders of allotment could be issued to the landlady, it was brought to the notice of the authorised officer that the landlady had deliberately made the house unfit for occupation by causing damage to the flooring, etc., thereby defeating the object for which the house was taken over under section 3 (3) of the Act. The complaint also mentioned that the accused was given time till 12th March, 1963 and the accused failed to hand over the premises in good tenantable condition, as required under section 3 (5) of the Act and thereby contravened the provisions of section 3 (5) read with section 33 of the Act.

On the facts alleged in the complaint, the petitioner cannot be found guilty of an offence under section 3 (5) of the Act. It was erroneously stated in the complaint that the landlady had notified the vacancy in her letter dated 21st February, 1963. On the other hand as pointed out above, the vacancy notice was given only on 3rd March, 1963. The action of the Accommodation Controller in notifying to the officials on 21st February, 1963 and his taking proceedings under section 3 (3) on 27th February, 1963 is not therefore in accordance with the law. Sub-section (5) is subject to the provisions of sub-section (3) of section 3. It provides that if the building is required for any of the purposes or for occupation by any of the officers specified in sub-section (3), the landlord shall deliver possession of the building to the authorized officer or to the allottee and the Government shall be deemed to be the tenant of the landlord with retrospective effect from the date on which the authorized officer received notice. It was contended by learned Public Prosecutor that sub-section (5) should be read independently of any service of notice of vacancy by the landlord under section 3 (1) or the officer taking action under sub-section (3) of section 3. According to him, section 3 (5) should be read independently and it should be construed to mean that the Accommodation Controller is entitled, when a building is required for the purpose of occupation of the officers specified in sub-section (3), to call upon the landlord to deliver possession of the building and if the landlord fails to do so, he would be contravening section 3 (5) of the Act. I am unable to accept this contention for a reading of sub-section (5) would indicate that it is subject to the provisions of sub-section (1) and sub-section (3) of section 3 and that any action under sub-section (5) can only be in furtherance of sub-section (3). The mention that the tenancy will have retrospective effect from the date on which the authorized officer received notice would also support this view. Any other construction is not possible for if sub-section (5) is construed as an independent section, the authorized officer will be empowered to require the landlord to deliver possession of the building at any time, whereas under sub-section (3) if he fails to notify that the building is required for Govrenmental purposes within seven days of the receipt of the vacancy notice given by the landlord, the landlord

will be at liberty to let the building to any tenant or to occupy it himself. A harmonious construction of the sub-sections would be that sub-section (5) is subject to sub-section (3) of the Act. On the complaint, therefore no offence is made out.

The learned Public Prosecutor submitted that even conceding that the Accommodation Controller was not empowered to notify under section 3 (3) on 27th February, 1963, after receipt of the vacancy notice on 3rd March, 1963, he was entitled to notify till 10th March, 1963, and therefore even though the order of requisitioning the building was passed on 27th February, 1963, it should be held that the requisition was legal and binding. I am unable to accept this contention.

Mr. Govindan, learned Counsel for the petitioner, submitted that not only there had been no contravention of any of the rules but his client, the landlady, was treated rather unfairly by the Accommodation Controller. He submitted that her request for her own occupation of the building by her letters dated 19th February, 1963, and 3rd March, 1963 was not properly considered either by the Accommodation Controller or by the Government. He submitted that the Accommodation Controller was in an unseemly hurry to allot the building to one of the officers without in any way considering the *bona fide* requirements of the petitioner. He submitted that though on 19th February, 1963 the petitioner informed the Accommodation Controller that the building was required for her own use, the Accommodation Controller had intimated the officers on 21st February, 1963 that the house was vacant and further on 27th February, 1963. he took steps under section 3 (3) without in any way referring to the request of the petitioner that the building was required for her own use. The petitioner also informed the Accommodation Controller by her letter Exhibit D-3 dated 27th February, 1963 that the house was wanted for her own occupation. In the report (Exhibit D-4) by the Accommodation Controller dated 28th February, 1963 it was stated that the enquiry revealed that the request of the landlady for the release of the premises was not *bona fide*. The Government also passed an order on 6th March, 1963 allotting the house to one of the I.A.S. Officers. The petitioner was not informed as to what happened to her request for her personal occupation of the house except in the letter of the Accommodation Controller where it was stated that her request was not *bona fide*.

However genuine the grievance of the petitioner may be, it cannot be said that either the Accommodation Controller or the Government failed to dispose of the application of the landlady requiring the house for her own occupation in accordance with the law. The only provision under which the landlady can get a building for her own occupation is section 29 under which she can apply for exemption to the Government. It is admitted that, in this case, the petitioner did not address the Government for any exemption nor is there material to show that it was brought to the notice of the Government that the petition of the landlady had to be considered by it. The Accommodation Controller is not empowered under the Act to release the house for the own use of the landlady. Therefore, the failure of the Accommodation Controller to take action on the letters of the landlady informing him that the house was required for her own use cannot be said to be in breach of any statutory duty cast on him. It may be that it is desirable that the request of the landlady for the release of the house for her own use should be considered on its merits. As there has been no contravention of any of the requirements of the Act or the Rules, the petitioner cannot have any legal grievance.

In the result, the petition is allowed. The conviction and sentence of fine are set aside. The fine, if paid, is directed to be refunded.

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Messrs. Sha Maggajee Saremall & Bros., No. 201, N.S.C. Bose Road, Madras-1 .. *Petitioner* *

v.

The Joint Chief Controller of Imports and Exports, Madras-1 .. *Respondent.*

Imports and Exports Control Act (*XVIII of* 1947)—*Change in the constitution of firm—Licence for a particular period—To be issued though recognition of change was subsequent to the period—Prohibition of the import for a latter period—Not to affect the grant of licence for the particular period—Hindu undivided family firm—Death of one member—Fact to be notified in application for licence—Jurisdiction to refuse licence in case of suppression.*

It is settled law that where a transfer of quota rights is effected as a result of change in the constitution of the firm, the newly constituted firm becomes entitled to the transferred quota as from the date on which the reconstitution is effected and not from the date on which the Chief Controller of Imports purports to accord recognition to such reconstitution. Notwithstanding that the recognition is accorded at a subsequent date, established importer cannot be denied the licence for the period before such recognition for which a valid application has been made.

What the import policy lays down is only whether during that period for which the policy is enunciated licences for the import of the several items should be permitted or not and if permitted, to what extent. It would not be correct to describe the Import Policy Book as enacting a ban on imports during that period. It is not open to the import authorities to rely upon the policy relevant to the later in dealing with the application for an earlier period.

The application for the grant of licence may be refused where the application contains false, fraudulent or misleading statement. Where the Hindu undivided family constituted itself into a firm for the purpose of business and if one member dies, there is a change in the constitution of the firm and that fact should be intimated to the Controller.

Petition under Article 226 of the Constitution of the India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue writs of *mandamus* directing the respondent to issue import licences to the petitioner firm for import of paper other sorts, and 'hinges' for the licensing periods (1) January-June 1956 and (2) July-December 1956, and the re spective grants mentioned in the communication to the petitioner No. 4/38/59 dated 10th August, 1961.

B. R. Dolia, for Petitioner.

The Additional Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—These three petitions challenge the order of the Import Control Authorities refusing the grant of licences to the petitioners in respect of certain licensing periods. W.P. No. 566 of 1962 relates to two periods, January to July, 1956, and July to December, 1956. The petitioners applied for import licences for 'paper, other sorts'. These applications were kept pending till recognition of transfer of quota rights to the petitioner firm and the petitioner was directed to get the changes in the constitution of the petitioner-partnership and the transfer of quota rights recognised. This was apparently approved by the Chief Controller of Imports in 1958 only, and by that order that authority stated that this recognition of the transfer of quota rights should be effective only for subsequent periods. This was followed by the rejection of the applications of the petitioner for the licensing periods mentioned above. This matter was brought before this Court in W.P. No. 782 of 1959. That petition was allowed and the Chief Controller of Imports was directed to dispose of the applications on the basis that the petitioner firm was entitled to the quota rights from the date of the actual reconstitution of the firm and not from the date of recognition by the Chief Controller. Thereafter, the Controller took up the applications for disposal, but called upon the petitioner to show cause why the applications should not be rejected as the change in the

* W.P. Nos. 566, 600 and 602 of 1962. 23rd April, 1965.

constitution was not disclosed. The petitioner submitted its explanation, but the authority took the view that by failing to disclose the fact that there was a change in the constitution of the partnership, the petitioner had made certain false statements in its application, and such applications, in which false and misleading statements were made, were liable to be rejected. This order is canvased in W.P. No. 566 of 1962. In the other two writ petitions, licence was sought for the import of hinges. The order of the authority in so far as W.P. No. 600 of 1962 is concerned was that the import policy on the date of consideration of the application did not permit the import of this item of goods and for that reason the application relevant to W.P. No. 600 of 1962 was dismissed. In respect of the application leading to W.P. No. 602 of 1962, the Import Authority relied on two grounds in dismissing it, one was that the application was tainted by suppression of fact and the other that on the date of the consideration of the application, no import was permissible for this item.

In the counter-affidavit filed on behalf of the Joint Chief Controller of Imports, it is contended that according to the instructions contained in the Import Policy Books, certain information is specifically called for from the parties who apply for licences, with particular reference to firms the constitution of which might have changed resulting in the alteration of the eligibility for the import quota applied for. Since this is a very necessary piece of information in order to deal with the grant of licences, the petitioner having been found to have given false information in its application in this regard, the application was liable to be rejected and was rightly rejected. In support of the ground that at the time of the consideration of the applications the import of hinges was prohibited, reference has been made to paragraph 31 of the Red Book relevant to the period 16th April-September, 1961. According to this instruction, the Department appears to have devised certain *ad hoc* rules as it were for dealing with the issue of import licences against applications for back periods. It is stated that in terms of these instructions, an import licence could not be granted for a back period. Generally speaking when, in a case there is a delay in dealing with an application, and the consideration of the application is taken up beyond that period, no licences are granted against applications pertaining to periods other than the immediately proceeding period. This general rule, it is said, has been applied, and since in 1961 when this application was dealt with, the application related to such anterior period, it was rightly refused.

In the outset, it may be stated that it is settled law as far as this Court is concerned that where a transfer of quota rights is effected as a result of change in the constitution of the firm, the newly constituted firm becomes entitled to the transferred quota as from the date on which the reconstitution was effected and not from the date on which the Chief Controller of Imports purports to accord recognition to such reconstitution. That this is the law is accepted by the learned Additional Government Pleader. It almost always happens that when a transfer of quota rights is recognised by the Import Control Authorities, there is considerable delay in the procedure involved and if a party should lose all rights to obtain licences for the intervening period, it will certainly result in great hardship and denial of any rights which were recognised to exist in the firm as it stood before the reconstitution. Notwithstanding that the recognition is accorded at a subsequent date, the established importer cannot be denied the licence for the period before such recognition, for which a valid application had been made. I am unable to see how the fact that a rule by way of an instruction has been introduced in the Red Book, limiting the consideration of applications only to the immediately prior period can have any value in so far as the rights of parties come in for examination. The reliance by the Department upon rule 31 said to have been introduced in the Policy Book for the year 1961 to the above effect cannot therefore operate to deny the right of the established importer to the licence for the back periods in respect of which this application had been kept pending for reasons other than laches by the applicant.

The learned Additional Government Pleader also concedes that the ground upon which the application has been rejected in the matter relevant to W.P.

No. 600 of 1962, *viz*., that at the time of the consideration of the application the import policy showed an entry '*Nil*' against the relevant item, cannot be sustained. In W.P. No. 5 of 1960, it was held that it is not open to the Import Authorities to rely upon the policy relevant to a later period dealing with an application for an earlier period. What the import policy lays down is only whether during that period for which the policy is enunciated, licences for the import of the several items should be permitted or not, and if permitted to what extent. It would not be correct to describe the Import Policy Book as enacting a ban on imports during that period. It deals only with the grant of licences for that period. Actually, it may turn out that when an import licence is granted for a particular period, on the basis of the policy prevailing for the period, the actual import is made under that licence sometimes a year or two later, and though the policy with regard to that item of import might have changed in the meantime, the import of that item under cover of the licence already granted is not an unlawful import. The Policy Book does not therefore prohibit the import. It deals only with the grant of licences during any particular period, though the import itself might be effected at a time when the policy has changed. That apart, the decision in W.A. No. 15 of 1960 emphasised the position that an application for a particular period must be considered only in the light of the policy relevant to that period and cannot be refused on the basis of a later policy which might have changed the position with regard to the licences for the import of the items applied for. This view has been reiterated in W.A. Nos. 27, 47, 48 of 1961.

It follows that in so far as W.P. No. 600 of 1962 is concerned, since the only ground relied upon by the Controller that the later policy prohibited the grant of a licence for hinges the application could not be granted, is erroneous in law, W.P. No. 600 of 1962 is allowed.

In W.P. Nos. 566 and 602 of 1962, the question arises whether the rejection of the applications for the reasons that the petitioners had furnished false and inaccurate particulars in their applications for the grant of licences is justified. In the order of the Joint Chief Controller, it is stated that against column 8 (A) of the applications, the petitioner had specifically indicated that there had been no change in the constitution of the firm since the issue of the quota certificate on 14th December, 1953. But the constitution of the firm had undergone a change on account of the retirement of a partner and on account of the reconstitution of the partnership between the date of the quota certificate and the date of the application for the import licences, and in view of the false and misleading statements, the applications were rejected. In the affidavit of the petitioners, the petitioners stated that the petitioners were 'a Hindu undivided family partnership concern' and they were under the impression that the death or retirement of one partner and the substitution of his branch in the place of the partnership firm was not a change in the constitution of the requiring approval of the Chief Controller of Imports and Exports, New Delhi for fresh quota. Virtually, therefore, the fact that there had been a change in the constitution of the firm during the period prior to the applications was not denied. What was claimed was that since the members of the partnership were also members of Hindu joint undivided family, the change in the constitution of the firm involved in the retirement of a member of the family was only that of substitution in his place of another member of the family and that would not require any intimation. This is obviously a misconception. When once a partnership has been formed, the petitioner is not entitled to say that the partnership is nothing other than the Hindu joint family itself doing business. The petitioner as an established importer must have been well aware that partnership firms and the changes in the constitution of such partnerships have been dealt with in a special manner by the Import Control Authorities. Retirement of a partner, it is expressly stated in the relevant rules, does not entitle the surviving firm to the full quota unless the retiring partner has relinquished his interest in favour of the surviving partner. The case of death, dissolution, etc., have been dealt with severally in the rules contained in the Import Control Policy Books. The failure to report change in the constitution of the firm and to obtain a fresh quota

certificate is certainly not in conformity with the rules, and the *explanation* attempted in the affidavit is hardly reasonable. It is argued by Mr. Dolia, on behalf of the petitioners, that this requirement about the disclosure was introduced only in 1956, but it does not appear to be denied that in so far as the licensing periods in question are concerned, the application form did in fact contain a clause to this effect, calling for disclosure of the relevant facts.

In the Import Trade Control Order, 1955, issued in the exercise of the powers conferred by the Imports and Exports Control Act, an application for the grant of a licence may be refused if the application contains any false or fraudulent or misleading statement. That the authority, if it is satisfied that the application is tainted in that manner, has jurisdiction to reject the application can therefore admit of no denial, and if, as a fact, the firm during the period prior to the application had changed its constitution and the fact of such change had not been incorporated in the application as required, the rejection is fully justified.

It follows that the order of rejection, which is the subject-matter of W.P. Nos. 566 and 602 of 1962, cannot be assailed as erroneous in law or in the improper exercise of jurisdiction. These petitions are accordingly dismissed. There will be no order as to costs in any of these petitions.

V.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. ANANTANARAYANAN.

B. T. Pani *alias* Thiruthandapani and another, *In re**.

Suppression of Immoral Traffic in Women and Girls Act (*CIV of* 1956), *sections* 2 (1), 4 (1) *and* 7 (1)—*Offence under—What constitutes.*

Having regard to the definition of "prostitution" under section 2 (1) of the Suppression of Immoral Traffic in Women and Girls Act, 1956, to entail a conviction under section 7 (1) of the Act the prosecution must strictly prove the legal ingredients constituting the offence. Section 7(1) of the Act is an unusual one which makes prostitution *per se* indictable, not merely against the woman who carries on prostitution but also the person with whom such prostitution is carried on. Hence the mere presence of a woman in a premises where prostitution is carried on, however, much the moral conviction that she too must have been or was obviously available for prostitution, will not justify a legal conviction unless it is proved that she offered herself for prostitution either directly or by gesture.

The evidence of the person who carried on prostitution will only be in the nature of evidence of an accomplice because his conduct is also within the mischief of section 7 (1) of the Act. Hence in order to sustain a conviction under section 4 (1) of the Act that the accused was living on the earnings of prostitution, the evidence of such an accomplice should be corroborated.

Petition under sections 435 and 439, Criminal Procedure Code, 1898, praying the High Court to revise the order of the Third Presidency Magistrate, Saidapet, Madras, dated 10th September, 1963, in C.C. No. 6204 of 1963.

S. Veeraraghavan, for Petitioners.

K. A. Panchapagesan for Public Prosecutor, for State.

The Court made the following

ORDER.—As far as the second revision petitioner, Kanthamma, who was the third accused in the Court of the learned Third Presidency Magistrate, is concerned, I think that the strictly legal argument should prevail that, on the record, the charge against her under section 7 (1) of Act CIV of 1956 (the Suppression of Immoral Traffic in Women and Girls Act) has not been established. Section 7 (1) is itself an unusual section, which, unlike other provisions of the statute, makes prostitution *per se* indictable, and not merely this, it makes it an offence both in respect of the woman or girl who carries on prostitution, and in respect of the person with whom such prostitution is carried on. In the present case, the prosecution has certainly established that any act of prostitution within the premises concerned would amount to the offence under section 7 (1), because it is within the prohibited distance of a place of public religious worship, the temple in the Srinivasa Gandhi Nilayam.

* Crl. R.C. No. 1545 of 1963 (Crl. R.P. No. 1496 of 1963). 7th August, 1964.

But learned Counsel for the second revision petitioner who was A-3 at the trial, justifiably urges that this offence has not be established, with regard to her. " Prostitution " under the definition in section 2 (*f*) of the Act, means " the act of a female offering her body for promiscuous sexual intercourse for hire ". There was another girl, by name, Sujata, with whom the act of prostitution was actually carried on by Varadarajan, P.W. 1. She certainly offered herself for prostitution, and she is punishable under section 7 (1), but her case is not now before me. As regards this revision petitioner, Kanthammal, the evidence is that she was not the girl with whom P.W. 1 carried on any act of prostitution. Further, the record does not show that, either by verbal offer or by gesture, she offered herself for prostitution. She was merely available in the premises, and it was the first revision petitioner who said that P.W. 1 could have either the girl Sujatha, or the present second revision petitioner, for the act of prostitution, within the premises, upon payment of consideration of Rs. 60. It is difficult to resist the moral conviction that the favours of the second revision petitioner were also available for hire, and that she would by no means have been unwilling to make the offer, if P.W. 1 had selected her. But the legal ingredients should be strictly proved, and cannot rest upon a mere presumption or inference of this kind. Hence I allow the Revision Petition, with regard to the second revision petitioner and acquit her accordingly.

As regards the first revision petitioner, at the first blush I considered that the argument of learned Counsel for the first revision petitioner also was plausible and deserving of every consideration. For the first revision petitioner has been convicted under section 4 (1) of Act CIV of 1956. To sustain this charge, the prosecution should make out that he lived or was living, on the earnings of the prostitution of a woman or girl. Now, there is some general evidence that these premises were probably being used as a brothel, and that the first revision petitioner, who was related to both the girls, was using the girls as prostitutes for hire, and earning monies by such infamous means. But that evidence is vague and inconclusive. The conviction really rests upon the testimony of P.W. 1 with whom A-1 had dealings that day. If the evidence of P.W. 1 is to be accepted that he paid Rs. 60 to A-1, who entered into the contract, and enjoyed the favours of the other girl, who is not before Court, then the offence under section 4 (1) would be established. But the interesting argument is that P.W. 1 is an accomplice, because he himself carried on prostitution within the prohibited premises and his conduct is within the mischief of section 7 (1) of the Act. That is indisputably the case here. Hence, as an accomplice, his evidence requires corroboration in material particulars, before it could be accepted and acted upon. But, in my view, such corroboration is forthcoming with reference to the charge against the first revision petitioner. For not merely was the amount of Rs. 60 recovered from the first revision petitioner, who produced it when the raid by the police officer took place, but the police officer who made the raid corroborates P.W. 1 regarding his presence, and his emergence from the room along with the prostitute with whom he was carrying on prostitution in the premises. P.W. 2 is a friend of P.W. 1, and an independent witness. He swears that P.W. 1 did tell the police officer immediately on emerging from the room, that he had hired the girl on a contract with A-1, and paid Rs. 60 for the contract. It was after this that A-1 himself produced Rs. 60 from his own person. The inference is irresistable that, even regarding P.W. 1 as an accomplice, his evidence is corroborated in the material particulars of the contract entered into between A. 1 and P.W. 1 for hire of the girl and the fact that A. 1 received Rs. 60 from P.W. 1 which amount he produced before the police. No doubt, the notes were not marked, but it is an irresiseble inference from the facts that the monies must have been just previously delivered to A-1 by P.W. 1. The conviction is justified, and must be confirmed.

As regards the sentence, I think that an adequately deterrent effect has been already secured by the prosecution itself, and by the imprisonment that the respective revision petitioners have undergone. For the reason, the sentence upon A-1 is reduced to the period of imprisonment already undergone by him. The proceeding is otherwise dismissed.

R.M. ——— *Orders accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Ahilandammal .. *Petitioner**

v.

S. Balasubramania Iyer .. *Respondent.*

Criminal Procedure Code (V of 1898), section 476—Applicability to an offence under section 471, read with section 195 (1) (c) of the Penal Code (XLV of 1860).

A reading of clauses (*b*) and (*c*) of section 195 (1), sections 476 and 479-A, Criminal Procedure Code makes it clear that when proceedings could be taken under section 479-A, proceedings under section 476 is forbidden. Section 476, Criminal Procedure Code, provides the procedure for a civil Court making a complaint in respect of offences referred to in section 195, sub-section (1), clauses (*b*) and (*c*), whereas section 479-A is restricted in its scope and confined only to offences of intentionally giving false evidence in any stage of the judicial proceeding or intentionally fabricating false evidence for the purpose of being used in any stage of the judicial proceeding. Regarding cases, which do not strictly fall under section 479-A, the procedure prescribed in section 476, Criminal Procedure Code, can be followed. Section 479-A does not comprise offences enumerated under section 195 (1) (*c*), Criminal Procedure Code, which includes an offence under section 471, Indian Penal Code. Section 479-A has no application to prosecution for offences other than an offence under section 193 and cognate sections in Chapter XI and as regards other offences sections 476, 477, 478, 479 continue to apply even after the enactment of section 479-A. In the instant case the trial Court was not barred from taking proceedings under section 476, Criminal Procedure Code.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of Madurai dated 30th November, 1961 and made in C.M.A. No. 52 of 1960 (M.P. No. 71 of 1960 in O.S. No. 75 of 1958), District Munsif's Court, Tirumangalam.

V. Vedantachari and *S. Kothandarama Nainar*, for Petitioner.

G. Gopalaswami and *S. G. Subramaniam*, for Respondent.

The Court delivered the following

JUDGMENT.—This petition is filed by the 1st defendant in O.S. No. 75 of 1958 on the file of the learned District Munsif, Tirumangalam against the Order of the learned District Judge of Madurai directing a complaint to be laid against her for offences under sections 467 and 471, Indian Penal Code.

The respondent herein filed O.S. No. 75 of 1958 on the foot of a mortgage dated 10th April, 1945 for Rs. 2,150 executed in his favour by the petitioner herein. The petitioner put forward a receipt Exhibit B-1 for a sum of Rs. 2,000 on 9th April, 1958 as evidencing payment of that amount towards the mortgage. The trial Court held that the receipt Exhibit B-1 was a forged document. The petitioner, who examined herself as a witness, stated that Exhibit B-1 was a genuine receipt given to her by the respondent. The two attestors to the receipt Exhibit B-1 and the scribe also gave evidence in support of the genuineness of Exhibit B-1 but we are, not, concerned, with them in this petition. The trial Court did not take action under section 479-A, Criminal Procedure Code. Eight months after the disposal of the suit the respondent filed a petition No. 71 of 1960 before the learned District Munsif, Tirumangalam praying that a complaint might be preferred against the petitioner under section 476 (1), Criminal Procedure Code. The trial Court was of the view that section 479-A, Criminal Procedure Code, was applicable not only for giving false evidence and fabricating false evidence but also to cases in which forged documents were used as genuine documents. As no action was taken at the time of the delivery of the judgment, the trial Court held that action could not be taken under section 476, Criminal Procedure Code. It also held that as the complaint was filed belatedly, eight months after the judgment was pronounced, it was not expedient in the interest of justice that the petitioner should be prosecuted for the offences complained of. On appeal the learned District Judge, Madurai held that the ban imposed under section 479-A (6), Criminal Procedure Code, would apply to witnesses only and not to a party, who happened to be a witness. He also held that the delay of eight months was not a sufficient ground for refraining from giving a complaint.

*C.R.P. No. 2492 of 1961. 7th August, 1964.

In the result the learned District Judge directed that a complaint be laid against the petitioner.

Section 195 (1), clauses (*b*) and (*c*) of the Criminal Procedure Code, are as follows :

"195. (1) No Court shall take cognizance—

(*a*)......................................

(*b*) of any offence punishable under any of the following sections of the same Code, namely, sections 193, 194, 195, 196, etc., when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, except on the complaint in writing of such Court or of some other Court to which such Court is subordinate or

(*c*) of any offence described in section 463 or punishable under section 471, section 475 or section 476 of the same Code, when such offence is alleged to have been committed by a party to any proceeding in any Court in respect of a document produced or given in evidence in such proceeding, except on the complaint in writing of such Court, or of some other Court to which such Court is subordinate."

Section 476, Criminal Procedure Code, prescribes the procedure for cases mentioned in section 195, Criminal Procedure Code. It provides that if a Court is of opinion that it is expedient in the interests of justice that an enquiry should be made into any offence referred to in section 195, sub-section (1), clause (*b*) or clause (*c*), which appears to have been committed in or in relation to a proceeding in that Court, such Court may, after such preliminary inquiry, record a finding to that effect and make a complaint thereof in writing signed by the Presiding Officer of the Court and shall forward the same to a Magistrate of the First Class having jurisdiction. Section 479-A of the Criminal Procedure Code was introduced by Act XXVI of 1955. Under this section, notwithstanding anything contained in sections 476 to 479 when a Court is of opinion that any person appearing before it as a witness has intentionally given false evidence in any stage of the judicial proceeding or has intentionally fabricated false evidence for the purpose of being used in any stage of the judicial proceeding, and that, for the eradication of the evils of perjury and fabrication of false evidence and in the interests of justice, it is expedient that such witness should be prosecuted for the offence which appears to have been committed by him, the Court shall, at the time of the delivery of the judgment or final order disposing of such proceedings, record a finding to that effect stating its reasons therefor and may, if it so thinks fit, after giving the witness an opportunity of being heard, make a complaint thereof in writing signed by the Presiding Officer of the Court setting forth the evidence which, in the opinion of the Court, is false or fabricated and forward the same to a Magistrate of the First Class having jurisdiction. Section 479 (*a*)(6) prohibits the taking of any proceedings under sections 476 to 479 for the prosecution of a person for giving or fabricating false evidence, if in respect of such a person proceedings may be taken under section 479-A.

A reading of clauses (*b*) and (*c*) of section 195 (1), and sections 476 and 479-A makes it clear that when proceedings could be taken under section 479-A proceedings under section 476 is forbidden. Section 476, Criminal Procedure Code, provides the procedure for a civil Court making a complaint in respect of offences referred to in section 195, sub-section (1), clauses (*b*) and (*c*) whereas section 479-A is restricted in its scope and confined only to offences of intentionally giving false evidence in any stage of the judicial proceeding or intentionally fabricating false evidence for the purpose of being used in any stage of the judicial proceeding. Regarding cases, which do not strictly fall under section 479-A, the procedure prescribed in section 476, Criminal Procedure Code, can be followed.

In this case the respondent filed a petition for prosecuting the petitioner under sections 463 and 471, Indian Penal Code. It is admitted that there is no evidence that the petitioner in fact made a false document as required under section 463 of the Indian Penal Code. But it is not disputed that she dishonestly used as genuine Exhibit B-1 having known or had reason to believe it to be a forged document and thereby would be guilty under section 471, Indian Penal Code. We are, therefore, concerned only with the prosecution for the offence under section 471, Indian Penal

Code. An offence under section 471, Indian Penal Code, consists in dishonestly using as genuine a forged document. This offence is different from an offence under section 193, Indian Penal Code, which relates to intentionally giving false evidence in any stage of the judicial proceeding or fabricating false evidence for the purpose of being used in any stage of a judicial proceeding. Section 195 (1) (*b*) of the Criminal Procedure Code deals with offences under sections 193 to 195 and other offences mentioned in the sub-section, while section 195 (1) (*c*) deals with offences under sections 463, 471, 475 or 476 when such offence is alleged to have been committed by a party to a proceeding in any Court. While section 476, Criminal Procedure Code, is the general provision regarding the procedure in all cases mentioned in section 195 (1) (*b*) and section 195 (1) (*c*), section 479-A, Criminal Procedure Code, is restricted in its scope to persons appearing as witnesses and intentionally giving false evidence in any stage of the judicial proceeding or intentionally fabricating false evidence for the purpose of being used in any stage of the judicial proceeding. Thus it will be seen that section 479-A does not comprise offences enumerated under section 195 (1) (*c*), Criminal Procedure Code, which includes an offence under section 471, Indian Penal Code. It is clear that an offence under section 471, Indian Penal Code is not covered by the procedure prescribed under section 479-A and therefore the procedure prescribed under section 476, Criminal Procedure Code, is not excluded. In a recent decision of the Supreme Court in *Babu Lal* v. *State of Uttar Pradesh*[1], it was held that offences of forgery and of fabricating false evidence for the purpose of using it in a judicial proceeding were distinct and the offence of forgery was not included for the purpose specified in section 479-A, Criminal Procedure Code. The Supreme Court also held :

> " In any event the offence penalised under section 471, Indian Penal Code, can never be covered by sub-section (1) of section 479-A."

It was pointed out by the Supreme Court that the reference to the words " and section 471 " in an earlier decision of the Supreme Court in *Shabir Hussain Bholu* v. *State of Maharashtra*[2] appear to have crept in by oversight. In *Raghubir Prosad Dudhawalla* v. *Chamanlal Mehra*[3], it was held :

> " The special procedure of section 479-A is prescribed only for the prosecution of a witness for the act of giving false evidence in any stage of judicial proceeding or for fabrication of false evidence for the purpose of being used in any stage of judicial proceeding. There is nothing in the section which precluded the application of any other procedure prescribed by the Code in respect of other offences."

The Supreme Court further observed :

> " It will be unreasonable to read into section 479-A the meaning that where a person who appears to have committed an offence under section 193 of the Indian Penal Code by giving false evidence or fabricating false evidence appears to have committed some other offence also, say, forgery, for the very purpose of fabricating false evidence complaint for such other offence also can be made under section 479-A of the Code of Criminal Procedure."

The Supreme Court was of the opinion that section 479-A has no application to prosecution for offences other than an offence under section 193 and cognate sections in Chapter XI and that as regards other offences sections 476, 477, 478 and 479 continue to apply even after the enactment of section 479-A.

For the reasons stated above I hold that there is no bar for the trial Court to take proceedings under section 476, Criminal Procedure Code for making a complaint to the Magistrate of the First Class having jurisdiction.

It has to be considered whether it is expedient in the interests of justice that an enquiry should be made into the offence. The Court, when it disposed of the suit, did not think it necessary in the interests of justice, to prosecute the petitioner. The Court did not also subsequently take steps *suo motu* to prefer a complaint against the petitioner, but after an interval of eight months the respondent filed a petition for

1. (1964) 2 S.C.J. 424 : 1964 M.L.J. (Crl.) 515.
2. (1964) 1 S.C.J. 609 : (1964) M.L.J. (Crl.) 338 : A.I.R. 1963 S.C. 816 at 820.
3. (1964) 1 S.C.J. 415 at page 416 : (1964) M.L.J. (Crl.) 233.

preferring a complaint against the petitioner. The District Munsif who heard the original suit and before whom the petition was filed did not think that the interests of justice required that the petitioner should be prosecuted. The petition is by the private party obviously to spite his opponent and the petition was filed after a lapse of eight months. In the circumstances the lower appellate Court was not justified in interfering with the discretion of the trial Court which disposed of the suit. Though this Court would not ordinarily interfere with the discretion of the lower appellate Court in Revision, I do not think that interests of justice require that complaint should be made. In this view I allow the petition and set aside the order of the Court below. There will be no order as to costs.

K.L.B. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Pachakutty Thondampiriarson of Muthuveerappa Thondampiriar .. *Petitioner**

Penal Code (*XLV of* 1860), *section* 215—*Receiving gratification for restoring stolen property without using all means to cause the thief to be apprehended—Onus of proof.*

Section 215 of the Penal Code is not intended to punish *bona fide* persons who offer to help a owner to recover property which he has lost by theft, criminal misappropriation, etc. It is intended to deal with cases where gratification is received by persons who offer to help the owner to recover his stolen property and who from the circumstances of their offer are expected to contact the thief, pay him a portion of the money on the understanding that he will not be exposed if he would release the concerned property to the owner. The first part of the section is intended to deal with persons who impliedly have means of contacting the offender and recovering the property and who then undertake to recover the property from the thief on payment of a sum which will serve to remunerate them and also 'square' up the thief. It is only when this state of affairs has been established by the prosecution can the onus of proof be thrown on the accused to prove the terms of the exception, namely, that he has "used all means in his power to cause the offender to be apprehended and convicted of the offence." Though the later clause above mentioned is in the nature of an exception or proviso within the meaning of section 105, Evidence Act, and the onus of proof in such cases will be on the accused, still taken in the context of the ingredients of the offence contemplated by the earlier part of the section, it is the duty of the prosecution initially to establish that the accused never intended to trace the offender and bring him to book, assuming that he had means of access to the offender. Till then the onus does not shift to the accused.

Quaere.—Whether the section applies to the thief also or applies only to the person who receives the gratification?

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of Sessions, Tiruchirapalli Division in Criminal Appeal No. 10 of 1963, dated 5th February, 1963 confirming the conviction and sentence passed by the Sub-Divisional Magistrate, Pudukottai in C.C. No. 280 of 1962 by his judgment dated 5th December, 1962.

G. K. Subramanyam, for Petitioner.

N. Srivatsamani, for the Public Prosecutor on behalf of State.

The Court delivered the following

JUDGMENT.—The accused in C. C. No. 280 of 1962, on the file of the Sub-Divisional Magistrate, Pudukottai, is the petitioner. He was convicted under section 215, Indian Penal Code, and sentenced to pay a fine Rs. 150, in default to undergo rigorous imprisonment for two months. The conviction and sentence were confirmed by the learned Sessions Judge, Tiruchirapalli, in appeal, and the accused has filed the present revision case.

The prosecution case against the accused is briefly this. P.Ws. 1 and 2 are brothers-in-law. P.W. 2 lives in a village called Theethanipatti. P.W. 1, had gone to Theethanipatti in a bullock cart and stayed there for some days. His bulls

* Criminal Revision Case No. 1501 of 1963
(Criminal Revision Petition No. 1452 of 1963). 1st October, 1964.

were stolen on the night of 12th May, 1962. On the morning of 13th May, 1962, P.W. 1 and his brother-in-law P.W. 2 went in search of the missing bulls. On the way they met the accused and assured P.W. 1, that he need not fear and that if Rs. 100 were paid to him, the bulls would be restored. P.Ws. 1 and 2 returned to their house saying that they would consider and let him know later. In the afternoon of 13th May, 1962, P.Ws. 1 and 2 went to the house of the accused at Ariandi, and gave Rs. 50 to him saying that it was all the money they were able to collect. P.W. 1 promised to pay the balance of Rs. 50 to the accused after the bulls were recovered. The accused then agreed to this course and received Rs. 50 from P.W. 1. Then he directed P.W. 1 to meet him that evening at Sakkiliankottaikadu with the balance of Rs. 50 when he would see that the bulls were restored to him. P.Ws. 1 and 2 went with the money in the evening to the place indicated above, but though they waited till 10 or 11 P.M., neither the accused did appear nor were the bulls restored. The next morning at Malaiyur village, they learnt that the bulls of P.W. 1 were in the police station at Karambakkudi. They went to the police station and found the bulls. P.W. 1 identified the bulls before the Sub-Inspector and told him what had happened. The Sub-Inspector recorded a complaint from him. The version as to how the bulls were traced is this. On 13th May, 1962, at about midnight, the Sub-Inspector of Police, Karambakkudi apprehended one Uthiraju on the Puttukottai Road with the bulls in his possession. These were the bulls which were identified by P.W. 1 the next morning at the police station. Uthiraju was convicted of theft subsequently by the Court. Thereafter, the charge-sheet was filed against the present accused under section 215, Indian Penal Code.

The accused's plea was that the allegations of P.Ws. 1 and 2 were totally false. P.W. 1 wanted to snatch away the properties of his elder sister and in that dispute the accused had interfered on behalf of the sister, in consequence of which there was enmity between him and P.W. 1. On account of this enmity the present false case had been filed against him. But no witness was examined by the accused to support his plea. Both the trial Court as well as the appellate Court accepted the evidence of P.Ws. 1 and 2 as to the incidents that happened on 13th May, 1962, and rejected the plea of the accused that a false case was foisted on him. I have also gone through the evidence and I find that this conclusion has to be upheld.

Learned Counsel appearing for the petitioner urged that to constitute an offence under section 215, Indian Penal Code, the onus lies on the prosecution to prove that the accused had not used all means in his power to cause the offender to be apprehended and convicted of the offence. There was no such evidence on behalf of the prosecution in the present case, and therefore, the conviction of the accused is illegal. Section 215 of the Indian Penal Code reads thus :

"Whoever takes or agrees or consents to take any gratification under pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

It is a matter of common knowledge that in several parts of India, persons of unscrupulous and anti-social conduct used to enter into league with thieves, especially cattle thieves, and extort money from the unfortunate owners, as considration for restoring the missing property, but allowing the thieves to go scot-free. Very often, the illegal gain thus obtained is shared by both. This form of collection of money for recovering stolen property is known as "*Thuppukooli*" in some of the districts in Tamilnad like Madurai, Ramanathapuram and Pudukottai. A similar practice also seems to obtain in North India, and this is apparent from several cases under section 215, Indian Penal Code, found in the decisions of other High Courts. This practice was very widely prevalent in the pre-British days, and even now it has not died out.

Two important questions have come up before Courts in regard to the interpretation of section 215 of the Indian Penal Code. One is whether that section will apply to the thief or whether it must be confined to a person other than the thief. In

Nalli Veera Thevan, In re[1], Ayling, J., held that section 215, Indian Penal Code, is not intended to apply to the thief but to some one, who being in league with the thief, receives gratification for helping the owner to recover the stolen property without at the same time using all the means in his power to cause the thief to be apprehended and convicted. There is also an earlier decision reported in In re, *Kudumban*[2], where a Bench of this Court held that the section would not apply to the case of the offender himself taking gratification. This view was followed by Somasundaram, J., in an unreported case of this Court in Crl. R.C. No. 1445 of 1949. On the other hand, the Allahabad High Court in a decision of a Full Bench in *Deo Suchit Rai* v. *Emperor*[3], differed from the Madras High Court's view and held that the section would also apply to the thief. However in the present case, we are not concerned with this aspect of the matter, as the person before the Court is not the thief. Actually, there is evidence that the thief was somebody else, who had been convicted by a Court of law subsequently. We are concerned with the second point that has arisen out of the section, namely, whether that part of the section which reads :

> "Unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence."

is in the nature of a proviso or exception, or is an essential ingredient of the offence. If it is the former, then under section 105 of the Evidence Act, the burden will be on the accused to prove the exception. On the other hand, if it is an essential ingredient of the offence and not an exception to it, the onus will be on the prosecution to prove it. On this point Courts in India have differed in their views. In the decision already cited *Deo Suchit Rai* v. *Emperor*[3], the Allahabad High Court differing from an earlier decision of the same Court in *Emperor* v. *Ram Naresh Rai*[4], and following certain decisions of the Calcutta High Court and Patna High Court, came to the conclusion that the onus of proof for this part of the section, was on the accused. In this Court, however, in the case mentioned above Crl. R.C. 1445 of 1949, Somasundaram, J., observed that the prosecution must lay

> "the foundation suggesting an inference that the accused has not used all means in his power to trace the offender and till then, the onus does not shift to the accused."

From a careful consideration of the language of section 215, it appears to me that it is not intended to create an offence, where a peson *bona fide* receives some amount as remuneration for tracing out lost or stolen property. If that were the meaning to be given to the section, a private detective, who undertakes to trace stolen property, will be *prima facie* guilty of the offence, unless he is able to convince the Court that besides attempting to recover the property, he also did everything in his power to bring the offender to book. The use of the word ' pretence ' makes the offence analogous to obtaining money by false pretences, that is the offence of cheating. But as an alternative to this, there are also in the section the words " on account of " implying that even where there is no pretence, that is where the representation is true, the offence can be committed. If we take the initial portion of the section, after excluding the words " unless he uses " etc., and treat the initial portion as constituting the ingredients of an offence, it would mean that the law contemplates that even a private detective, who receives consideration *bona fide* for helping a person to recover stolen property, will commit an offence. Incidentally, under the terms of the section, the property could also be the subject of criminal misappropriation or of cheating. The more reasonable view which appeals to me is that this section is not intended to punish such *bona fide persons who offer to help the owner* to recover property which he has lost by theft ; criminal misappropriation etc. It is intended, as mentioned earlier in this judgment, to deal with cases which are similar to collections in the nature of " *Thuppukooli* " made by the persons who from the circumstances of their offer to help the owner, are expected to contact the thief, pay him a portion of the money on the understanding that he won't be exposed if he would release the concerned property to the owner. There is thus, besides the promise

1. (1914) 26 M.L.J. 598.
2. 1 Weir Crl. Rulings 196.
3. A.I.R. 1947 All. 225 (F.B.).
4. I.L.R. 54 All. 55.

by the accused to recover the stolen property, an implied association between him and the thief or the means on his part of discovering the thief and recovering the property, but without at the same time any undertaking on his part to do what the law expects every honest citizen to do in his situation namely to help in the prosecution of the person who has committed a cognisable and non-bailable offence like theft or an offence in regard to movable property. For giving the section this significance—which in my view it is really intended to have—the first part has to be read in conjunction with the last part containing the words " unless he uses all means in his power to cause the offender to be apprehended ". Therefore, the first part of the section itself is really intended to deal with persons who impliedly have means of contacting the offender and recovering the property, and who then undertake to recover the property from the thief on payment of a sum which will serve to remunerate them and also " square " up the thief. It is only when this state of affairs has been established by the prosecution, can the onus of proof be thrown on the accused person to prove the terms of the exception namely that he had " used all means in his power to cause the offender to be apprehended and convicted of the offence ". These being facts within his knowledge the statute has placed the onus on him to establish them. Therefore, though it is clear that the clause " unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence " is in the nature of special exception or proviso, within the meaning of section 105 of the Evidence Act, for which the onus of proof is on the accused, the juxta-position of this clause with the other ingredients of the offence specified in the first portion of the section, shows that the prosecution has initially to establish that the circumstances of the taking of the money were such that the accused received it without any intention of tracing the offender and bringing him to book, assuming he had the means of getting at the offender.

The exact nature of these circumstances must depend upon the facts of each case. For example, if a person who takes the money is a professional private detective, who takes it only for his remuneration and who can be expected to assist the law in booking the offender, if in the course of investigation he contacts him, he will not be committing an offence under this section. It would not be proper to prosecute him, and put him on his defence, to prove that he had used all means in his power to cause the offender to be apprehended. On the other hand, where a person has no such *bona fide* status, and demands a sum of money, out of all proportion to the legitimate expenses required for his reasonable remuneration for tracing out the stolen property, it will *prima facie* imply that the money was received also for " squaring " up the thief and save him from prosecution. In the present case, the money demanded was Rs. 100 and the accused promised to produce the missing bulls before nightfall. If his conduct had been *bona fide*, he would be expected to promise only to make a search for the missing bulls. Such search also would require time. His calm assurance that he would produce the bulls by night-fall, shows that the accused knew or had the means of knowing the whereabouts of the offender. The large sum of money he took for the purpose also shows that the bargain was that he would not take any steps to bring the offender to book, but pay some money to him, and " square " him up. The circumstances of the present case indicate that the accused, when he received the money and made the representation that he would recover the property stolen before night fall, had the means of getting at the offender and that be had also no intention to bring him to book, while restoring the property. When confronted with this evidence, he denied it *in toto*. The conviction under section 215, Indian Penal Code, is, therefore, correct. The sentence is not excessive. The Revision Case is dismissed.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice* AND MR. JUSTICE K. SRINIVASAN.

Public Prosecutor .. *Appellant* *

v.

Basheer Sahib .. *Respondent.*

Prevention of Food Adulteration Act (*XXXVII of* 1954), *sections* 2 (1) (*a*), 7 *and* 16 (1)—*Prevention of Food Adulteration Rules*, 1955, *rule* 22—*Sample* (*milk*) *sent for analysis less than the quantity prescribed under rule* 22—*If non-compliance and vitiates trial*—*Preservative not added*—*Report of Analyst nine weeks after taking of sample*—*Acquittal if can be interfered within appeal.*

On Reference to Bench (*Ramachandra Iyer* and *Srinivasan, J.*) *Held* : Two points were urged in this appeal against acquittal of offence under sections 7 and 16 (1) read with section 2 (1) (*a*) of Act XXXVII of 1954 : (1) A sufficient quantity of the sample (milk) as required under rule 22 of the Rules was not sent for analysis. (2) Since no preservative was added the milk would not have retained the quality and condition in which the sample was, when taken, at the time it was analysed.

Though rule 22 employs the word 'shall', the specification of an approximate quantity therein minimises the mandatory force of the expression ; the provision is only a means for securing the evidence of an expert witness. If the quantity furnished was adequate enough to render possible all the tests necessary and the expert was in a position to pronounce on the material supplied, the short supply would not detract from the value of that evidence.

Whether the quantity was adequate enough for the purpose in question is a matter which might call for investigation in the circumstances of any particulr case. It can never be stated as an absolute proposition that upon a lesser quantity than that prescribed in the rule, no proper analysis could at all be done.

Per *Kunhamed Kutti, J.* (after Reference was answered by the Bench) :. Where there is no evidence of any addition of a preservative to the sample (milk) sent for analysis and in the absence of any evidence as to when the sample was analysed and in view of the fact that the report of the analyst was received nine weeks after the taking of the sample it is not possible to accept the theory that the milk had not undergone any change in quality and condition ; nor can any conclusion be based on the result of the analysis on the assumption that the sample as sent was analysed by the Analyst.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid Respondent (accused) of an offence under sections 7 and 16 (1) read with section 2 (1) (*a*) of the Prevention of Food Adulteration Act by the Sub-Divisional Magistrate, Ariyalur, in C.C. No. 127 of 1962 on his file.

S. R. Srinivasan, for the Public Prosecutor, for Appellant.

Jayalakshmi Shanmughavel, for Respondent (engaged by the Court under Rule 241 of the Criminal Rules of Practice and Orders, 1958).

When the appeal came on for hearing before him the following order of reference was made by

Kunhamed Kutti, J.†—The question raised in this appeal involves the interpretation of rule 22 of the Rules framed under the Prevention of Food Adulteration Act. The question is whether when the quantity of milk sent for analysis is less than eight ounces the quantity required under rule 22, the same would be deemed sufficient to enable the Analyst to arrive at an appropriate result, when the rule has, as a mandatory provision, fixed the aforesaid minimum. The judgment of my brother Ramakrishnan, J., in Criminal Appeal No. 637 of 1962 which purports to follow a decision of Sadasivam, J., in *Public Prosecutor* v. *Muthu Naicker*[1] was relied on by the learned Public Prosecutor, in support of his contention that, even though the provision of rule 22 is mandatory, the exact quantity of the food article specified therein need not be sent for analysis, and that if the quantity sent to the Analyst was sufficient for analysis then that should be deemed to meet the requirements of rule 22. The question is one which comes before Court often and after going through the judgment of Ramakrishnan, J., with

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* Criminal Appeal No. 688 of 1962. 9th October, 1964.

† 24th July, 1964.

1. (1963) 1 M.L.J. 55 : (1963) M.L.J. (Cri.) 115.

respect, I am free to confess that I have not been able to fully agree with the reasoning therein so that it seems to me that an authoritative ruling on the point by a Bench of this Court is required.

This case will, therefore, be placed before my Lord the learned Chief Justice to be placed before a Bench, if he so chooses.

In pursuance of the above Order of Reference, this appeal came on for hearing before *Ramachandra Ayyar, C.J.* and *Srinivasan, J.*

K. Harichandrandas, for Public Prosecutor.

Mrs. Jayalakshmi Shanmughavel, for Respondent.

The Judgment of the Bench was delivered by

Srinivasan, J.†—This appeal comes before us on a Reference by Kunhamed Kutti, J., The learned Judge felt a doubt with regard to the proper interpretation of rule 22 of the Rules framed under the Prevention of Food Adulteration Act, though in two earlier judgments of single Judges of this Court, the view had been taken that the rule is not mandatory in the sense that non-compliance therewith would vitiate the prosecution proceedings. For that reason that this question is one which is likely to arise frequently, the matter has been placed before a Bench.

The petitioner was prosecuted under sections 7 and 16 (1) read with section 2 (1) (*a*) of the Prevention of the Food Adulteration Act, 1957. The Food Inspector, who is the complainant, seized a certain quantity of milk from the petitioner and divided the milk into three parts, one of which was handed over to the petitioner and one part sent to the Government Analyst. The report of the Analyst showed that the milk contained 13 per cent of added water. The Sub-Divisional Magistrate who tried the case found that the quantity sent to the Government Anayst consisted only of 5.2 fluid ounces. Rule 22 however prescribed that the quantity of the sample to be sent to the Public Analyst shall be in the case of milk, 9 ounces. The trial Magistrate accepted the contention that the opinion of the Analyst arrived at on conducting tests with a quantity less than that prescribed by the rule cannot be taken to be one arrived in accordance with the law. He accordingly acquitted the accused.

The Public Prosecutor filed an appeal against the acquittal, and that is how the matter came before the High Court.

It is unnecessary to refer to the several sections of the Act. Broadly stated, Food Inspectors have been appointed under section 9 of the Act. Under section 10, certain powers have been conferred upon them which include the power to take samples of any article of food from any person selling such article and to send such sample for analysis to the Public Analyst for the local area appointed under section 8 of the Act. Section 11 prescribes the procedure to be followed by the Food Inspectors when taking sample of food for analysis. Section 12 enables the purchaser of any article of food also to have such article analysed by the Public Analyst. Section 13 proves that the Public Analyst shall deliver a report to the Food Inspector of the result of the analysis of any article of food submitted to him. A report so made by the Public Analyst may be used as evidence of the facts stated therein in any proceeding under this Act. The Rules framed under the Act prescribe by rule 22 the quantity of sample to be sent to the Public Analyst. In so far as milk is concerned, the quantity so prescribed is 220 ml (cc) and this quantity is described in that rule as the "approximate quantity to be supplied." The only point to be noticed in this connection is that with regard to a variety of articles of food, different approximate quantities to be supplied are specified in the appropriate column of the rule.

There is no doubt that in this case a quantity less than what is prescribed in this rule was sent to the Analyst. The question is whether, though the Public Analyst did not apparently find any difficulty in making a proper analysis of the article sent to him, the failure of the Food Inspector to send an approximate quantity

† 7th September, 1964.

of 220ml. vitiates either the result of the analysis or the proceedings under the Act.

Rule 22 reads thus :

"The quantity of sample of food to be sent to the Public Analyst for analysis shall be as described below :

....

milk approximate quantity to be supplied 220ml."

....

Before Kunhamed Kutti, J., the learned Public Prosecutor relied upon two earlier judgments and urged that though the provision of rule 22 is worded mandatorily, the exact quantity of the food articles specified therein need not be sent for analysis and that if the quantity sent to the Analyst was sufficient for analysis, then that should be deemed to meet the requirements of rule 22. But the learned Judge felt unable to accept this argument which had apparently been accepted in the earlier judgments and thought that an authoritative ruling was necessary.

In Criminal Appeal No. 363 of 1961, reported in *Public Prosecutor* v. *Muthu Naicker*[1], Sadasivam, J., was of the view that the quantity mentioned in rule 22 is only an approximate quantity and sending a smaller quantity would be proper compliance with the rule, unless the Central Food Laboratory finds difficulty in analysis because of the smallness of the quantity and prejudice is caused to the accused. The learned Judge observed in that case that the Public Analyst was able to give his opinion by analysing 4 ounces of milk, though the rule required a larger quantity to be sent. This view was followed by Ramakrishnan, J., in Criminal Appeal No. 637 who dealt with the matter thus :

"The question whether the sending to the Analyst of a quantity of the sample less than the one prescribed in the rule has made the report of the analysis unreliable must be considered independently on the facts of the case..............it appears that the provision under rule 22 was intended to enable the Analyst to have samples in an adequate quantity for the purpose of making his analysis and provide guidance for the authorities who take the sample. If the sample sent was less than the prescribed quantity, it was for the Analyst in any particular case to express his difficulty in analysing and insist upon the prescribed quantity being sent. But there is nothing in the present case to show that the Analyst felt any difficulty in making the analysis. The conclusion of the learned Sessions Judge that the analysis was vitiated is based on the sole reason that the quantity sent was only half of the quantity prescribed under the rule; such a conclusion would not necessarily follow :.........."

He then referred to the judgment earlier cited and accepted that interpretation.

We are in entire argument with the view expressed above. Though the rule employs the word 'shall,' the specification of only an "approximate quantity" minimises the apparent mandatory force of that expression. Nor can we agree that the supply of a lesser quantity than what the rule indicates would affect the evidentiary value of the analysis solely for the reason of such short supply. As the learned Judges have pointed out, this provision is only a means for securing evidence of an expert witness and if the quantity which the expert was furnished with was adequate enough to render possible all the tests necessary and the expert was in a position to pronounce upon the material, the fact that he was supplied with a lesser quantity cannot detract from that evidence. Whether the quantity was adequate enough for the purpose in question is a matter which might call for investigation in the circumstances of any particular case. It can never be stated as an absolute proposition that upon a lessor quantity than that prescribed in the rule, no proper analysis could at all be done. The arguments advanced on behalf of the respondent are precisely to that effect, an argument which we wholly fail to appreciate.

The learned Public Prosecutor has drawn our attention to a passage in *Halsbury's Laws of England*, Volume 17 (Third Edition) at page 470. The passage reads :

"The insertion in the certificate of the weight of the sample is not obligatory, unless the weight is a material factor in the analysis and its omission will not necessarily invalidate the certificate."

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1. (1963) 1 M.L.J. 55 : (1963) M.L.J. (Crl.) 115.

It is not however clear whether in the case of the basis on which the above commentary has been made, there was any insistence upon furnishing to the Analyst any minimum weight of the sample. This extract though not of much assistance in the context of the present case, is still helpful in showing that unless specification of the quantity is a material factor in the context of the analysis of the article, the submission of a lesser quantity would not vitiate the validity of the analysis.

The Reference is answered on the lines indicated.

The appeal then came on for hearing before Kunhamad Kutti, J., after the pronouncement of the judgment of the Bench of this Court.

S. R. Srinivasan for the Public Prosecutor.

Mrs. Jayalakshmi Shanmughavel, for Respondent.

The Court delivered the following

JUDGMENT.†—When this appeal first came up for hearing, two points were urged before me, (1) that a sufficient quantity of milk as required under the Rules was not sent for analysis and (2) that since no preservative had been added, the milk would not have retained its quality and condition in which a sample of it was taken by Food Inspector, P.W. 3 at the time it was analysed.

On the first point in view of the conflict of view, a Reference was made to a Bench of this Court for a ruling as to whether rule 22 of the Rules framed under the Prevention of Food Adulteration Act is mandatory, so that, if a lesser quantity of the food article than contemplated by the aforesaid rule is sent for analysis, that would be said to vitiate the trial. The Bench has now expressed its opinion that it cannot be stated as an absolute proposition of law that if a lesser quantity than that prescribed by the aforesaid rule is sent for analysis, no proper analysis could at all be done. The learned Judges further pointed out that, though the rule employs the word 'shall,' the specification of only an 'approximate quantity' minimises the apparent mandatory force of that expression. In view of the opinion expressed by the Bench I have to hold that the quantity of milk sent in this case was sufficient for analysis and the objection raised in this regard by the respondent cannot be upheld.

Coming to the second point it is not claimed that preservatives such as formal in had been added to the milk in question. Indeed, there is absolutely no evidence on this point as though the Food Inspector has given evidence as P.W. 3, he has not chosen to state that he had added any formalin to the milk to preserve its original condition.

The learned Public Prosecutor however states that, if the milk had undergone a change it would have turned itself into curd, but the Analyst's report shows that it had retained its quality as milk. The Analyst's report in this case was sent on 9th April, 1962, nine weeks after the sample of the milk was taken by the Food Inspector. It is impossible to hold that during these nine weeks the milk would have retained its original quality or condition when no preservative had been added to it and there is no evidence in this case that any preservative had been added. In the circumstances, I am unable to accept the theory that the milk had not undergone any change in the absence of evidence as to when it was analysed ; nor, in the circumstances, am I inclined to base any conclusion on the prosecution case on the result of the analysis received by the Food Inspector nine weeks after the sample was sent on the assumption that milk as sent by him had been analysed by the Analyst. It seems to me therefore that this is a case where, on the second point the respondent is entitled to be acquitted.

There is thus no justiciable ground to interfere with the order of acquittal in this case. This appeal is therefore dismissed.

K.G.S. *Appeal dismissed.*

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† 9th October, 1964.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Marayee Ammal and another .. *Appellants* *

v.

Minor Nalluswamy by next friend maternal grandfather Ammayappa Goundar .. *Respondents.*

Contract—Illegal consideration—Effect—Second marriage by Hindu male in contravention of Hindu Marriage Act (1959)*—Settlement of immovable properties on proposed second wife for life with remainder to children of union—Illegality of marriage—If renders both gifts void—Validity of gift of remainder to children—Hindu Marriage Act* (*XXV of* 1959)*—Contract Act* (*IX of* 1872), *sections* 2 *and* 23.

Where a Hindu male marries a second wife in contravention of the Hindu Marriage Act, 1959, and in consideration of the second wife consenting to the marriage executes prior to the marriage a deed of settlement in favour of the proposed second wife, gifting certain immovable properties to the proposed second wife to be enjoyed by her for life, with vested remainder to the children of the union, the consideration for both the gifts (to the wife of the children) being an illegal consideration, both the gifts must be held to be void as being for an illegal or unlawful consideration. It cannot be said that the illegality would render void only the gift to the second wife, but not the gift to the children of the minor.

The one and the same illegal consideration covers both the gifts and has the effect of rendering them void.

Mrs. Manathaw v. *Matisham*, (1956) S.C.J. 701 : (1956) 2 M.L.J. (S.C.) 67, distinguished.

Appeal against the Decree of the District Court of Tiruchirapalli dated 10th October, 1961 in Appeal Suit No. 220 of 1961 preferred against the decree of the Court of the District Munsif of Karur in Original Suit No. 97 of 1960.

K. S. Champakesa Iyengar and *K. C. Srinivasan,* for Appellants.

K. Sarvabhauman for *T. R. Mani,* for Respondent.

The Court delivered the following

JUDGMENT.—The point for decision in this Second Appeal is a very brief one. One Marappa had two daughters, defendants 2 and 3 in the suit, by his first wife, Kaliammal, the first defendant. In 1951, he proposed to marry, as his second wife, one Ammayakkal. Under the Hindu Marriage Act (XXV of 1955) such a second marriage is illegal. However, notwithstanding this provision of law, Marappa is said to have married Ammayakkal, and the plaintiff was born to them, as a result of this illegal second marriage. Shortly prior to the marriage, Marappa made a settlement under Exhibit A-1 of the plaint-schedule properties. Under the settlement deed, he agreed to give the properties, to Ammayakkal to be enjoyed by her for life, with vested remainder to the children of their union. Consideration for the entire settlement deed was the proposed illegal second marriage. Marappa died in 1958. Alleging that the defendants had wrongfully trespassed on the property, the plaintiff filed the suit, out of which this Second Appeal arises, for possession. The trial Court decreed the suit, and defendants 2 and 3 appealed. The learned District Judge, Tiruchirapalli in the appeal, found that the consideration for the settlement deed was the second marriage with Ammayakkal, which was an unlawful consideration. Nevertheless, the learned District Judge was of the opinion that this illegality would render void only the bequest to Ammayakkal, but the gift over to the plaintiff on the death of Ammayakkal, would be valid, and that this would give the plaintiff a vested right in the suit property. Ammayakkal is now dead. Therefore the lower appellate Court gave a decree to the plaintiff for possession with ascertainment of future mesne profits. The present Second Appeal is filed by defendants 2 and 3.

The learned District Judge, in appeal, has given the reason for his conclusions thus :

"The object of the settlement was to provide for Ammayakkal as the second wife of the settlor. The consideration for the settlement is the consent said to have been given by Ammayakal to marry Marappa Goundar. Both the object and consideration are forbidden by law. Where the consideration or object of an agreement is forbidden by law, the agreement becomes void. Therefore, the

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*Second Appeal No. 1986 of 1961. 13th November, 1964.

contract by which the suit property was conveyed in favour of Ammayakkal has to be struck down as void. The question is, whether the settlement as a whole is liable to be struck down as void or whether it should fail so far as the transfer in favour of Ammayakkal alone is concerned."

This would show that even assuming that there were two gifts, one to Ammayakkal for her life, and the second, the gift of the vested remainder to her children, the consideration for both the gifts was the promise by Ammayakkal to marry Marappa Goundar, and this consideration is illegal being opposed to the Hindu Marriage Act. It is well-known that under section 2 (*d*) of the Indian Contract Act, the consideration may move to the promisor from the promissee or from a third person. In the present case, the consideration for the gift of the vested remainder to the children moved from Ammayakkal to Marappa, *viz*., her promise to marry him. So this is a case where, for both the gifts, there was one and the same consideration which was illegal, the effect of which would be to vitiate both the gifts as having been for an unlawful consideration. Learned Counsel for the respondent referred me to the decision in *Mrs. Maneshaw* v. *Motishaw*[1]. In that case, a will contained two bequests. The first part of the bequest in the will was considered to be in operative, because the donee, who happened to be the husband of the donor, attested the will. But in such cases, section 67 of the Indian Succession Act provides that the bequest will be void, only so far as it concerns the person so attesting, but it would not render void the rest of the bequest. That principle has no application to the present case, where the illegal consideration itself covers both the bequests and therefore has the effect of rendering them both invalid.

I therefore, allow the Second Appeal and dismiss the plaintiff's suit. The appellants will get costs of the Second Appeal only. No leave.

P.R.N. *Appeal allowed; Suit dismissed; Leave refused.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Parvathiammal .. *Petitioner**

v.

P. K. Govinda Panicker .. *Respondent*.

Madras Buildings (Lease and Rent Control) Act (*XVIII of* 1960), *sections* 17 (1), 17 (4) *and* 33—*Order for restoration of amenities—Finality—Not to be questioned in penalty proceedings before Magistrate—Order under section* 17 (4)—*Non-compliance amounts to contravention under section* 17 (1) *of the Act*.

In penalty proceedings before the Magistrate under the provisions of the Madras Rent Control Act, it is not open to plead in defence that the landlord had not cut off the amenities, where the order of the Rent Controller directing the restoration of the amenities had become final in appeal.

Section 17 (1) of the Act is the section entitling the tenant to the continuance of the amenities. Section 17 (4) provides for an order for restoration of the amenities, if the amenities are cut off or withheld by the landlord without just or sufficient cause. The result of non-compliance with an order under sub-section (4) is conclusive evidence that the amenities which the tenant was entitled to under section 17 (1) were unlawfully cut off entitling the tenant to seek relief under section 33 (3) of the Act for punishing the landlord.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment ofthe Sixth Presidency Magistrate of the Court of the Presidency Magistrate, Saidapet, Madras, dated 20th April, 1964 and passed in C.C. No. 9442 of 1963.

K. R. Ramabhadran, for Petitioner.

A. Subramania Ayyar, for 1st Respondent.

S. R. Subramanian for the Public Prosecutor, on behalf of State.

The Court made the following

ORDER.—This Revision is directed against the order under section 33 of the Madras Buildings (Lease and Rent Control) Act, 1960. On the application of the

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1. (1956) S.C.J. 701 : (1956) 2 M.L.J. (S.C.) 67 (1956) S.C.R. 639.

* Crl. R.C. No. 791 of 1964. (Crl. R.P. No. 772 of 1964). 24th November, 1964.

tenant in H.R.C. No. 908 of 1962 the Rent Controller directed the restoration of certain amenities, a kitchen and a pathway. There was an appeal therefrom in H. R. A. No. 661 of 1962 and the appellate Court upheld the order of the Rent Controller and found that the respondent was entitled to the restoration of the amenities, namely, the kitchen and the pathway, taken away from the tenant by the landlord. The appeal was dismissed, the judgment being pronounced on the 8th July, 1963. That order has become final and has not been the subject of any subsequent challenge. The present proceedings have been initiated by the tenant under section 33 of the Madras Buildings (Lease and Rent Control) Act. The defence is a denial of disobedience. The learned Sixth Presidency Magistrate went into the question whether the present petitioner had disobeyed the orders and contravened the provisions of section 17 of the Act and found that the denial was not maintainable on the evidence and that the present petitioner was guilty under section 33 of the Act.

It may be stated that the main defence, which was only in argument, was that there was no finding in the earlier proceedings before the Rent Controller that the accused had cut off the amenities without just or sufficient cause. But this contention is not open in the present proceedings. That order has become final. The very defence of the petitioner that the original order was not justified confirms the complaint that there has been disobedience of the order passed by the Rent Controller under section 17 (1). The petitioner even here seeks to maintain that the claim by the tenant was not for amenities to the restoration of which he was entitled. It being not open to the petitioner in these proceedings to go behind the order and contend that there was no cutting off, of the amenities, learned Counsel next raised a point that the Court had no jurisdiction to entertain the complaint under section 33 (1) of the Act. The point made is that section 33 of the Act, Madras Buildings (Lease and Rent Control) Act, XVIII of 1960 refers only to the contravening of the provisions of sub-section (1) of section 17 or of an order under sub-section (3) of section 17 of the Act. It is argued that as admittedly there was no order under sub-section (3) of section 17 and there being no reference to an order under section 17 (4) in section 33, the prosecution for non-compliance with an order under section 17 (4), is untenable. It is overlooked that section 17 (1) is the section entitling the tenant to the continuance of the amenities. Sub-section (4) of section 17 provides for an order for the restoration of the amenities if the amenities are cut off or withheld by the landlord without just or sufficient cause. The result of non-compliance with order under sub-section (4) is conclusive evidence that the amenities which the tenant was entitled to under section 17 (1) were unlawfully cut off. An order under section 17 (4) being there, and it being clear from the defence itself that there has been no restoration of the amenities pursuant to the order if follows that the landlord has contravened section 17 (1) of the Act. This entitles the tenant to seek relief under section 33 of the Act for punishing the landlord. The question of jurisdiction also therefore fails.

The petitioner has misconceived her rights and, in the circumstances, I reduce the fine to a sum of Rs. 50. With this modification in the sentence, the Revision Petition is dismissed. Time for payment of fine two weeks.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

Ramaswami *alias* Rajavelu .. *Appellant.**

French Establishments (Administration) Order, 1954, *Article* 5—*Pondicherry (Administration) Act* (*XLIX of* 1962), *section* 4—*Pondicherry (Laws) Regulation* (*VII of* 1963), *section* 4 (2) (*d*)—*Force and effect of—Investigation and trial of criminal offence in case where committal order had been made after investigation after the* de facto *transfer of French India in* 1954 *and before* de jure *transfer in* 1962—*Procedure for trial—French law or Indian law—Applicability.*

Criminal Procedure Code (*V of* 1898) *and Penal Code* (*XLV of* 1860)—*Constitution of India* (1950), *Article* 13 (3) (*a*)—"*Established law*"—*Meaning of.*

It is a well-known principle of International Law that a foreign settlement, obtained in an inhabited country, by conquest or by cessation from another power stands in a different position from a settlement made by colonising, that is, peopling an uninhabited country. In the latter case the subjects of the country from which they emigrate carry with them the laws of the country of their origin, there being, of course, no *lex loci*. In the former the law of the country to which they go continues until the Crown or the Legislature change it.

This principle has been carried out successively in section 5 of the French Establishments (Administration) Order, 1954, section 4 of the Pondicherry (Administration) Act, 1962, and section 4 (2) (*d*) of the Pondicherry (Laws) Regulation, 1963. By the force of these repealing and saving provisions the pre-existing French Law has become as much "the established law" in force in the territory of India within the meaning of Article 13 (3) (*a*) of the Constitution of India, as any other law of the Indian Union, such as the Criminal Procedure Code or the Penal Code. That the law thus given validity was originally a law in force in what was foreign territory would not effect the question of its being an established law in the territory newly added to the Indian Union.

The pre-existing French Law preserved for enforcement in the newly added French territories, is not an *ad hoc* legislation designed to meet a particular contingency or a particular set of persons, but was a law firmly and well established in that territory, having general acceptance under the principles of International Law. The citizens of that territory have, therefore, a vested right to be governed by the French Law, *i.e.*, the French Criminal Procedure and French Penal Code, until such time as a competent authority introduces new patterns of legislation. It is also clear that the modified provision of the "Code De Procedure Penale" which came into force in France and other French territories after the date when the former French possessions in India came under the *de facto* jurisdiction of the Government of India in 1954, and before the *de jure* transfer of jurisdiction in 1962 would have no application to a case where after the *de facto* transfer in 1954, and before the *de jure* transfer in 1962, after the investigation by the Police in a criminal case, and other processes a committal had been made for trial before the "Tribunal Criminal".

It is not the law that after the extension of the Constitution of India to Pondicherry, only the Indian Criminal Procedure and Penal Code should be applied for the trial of the accused in such a case and not the French Laws.

Appeal against the Order dated 13th November, 1961 of the Chambre des Mises en Accusation of the Tribunal Superieur d' Appeal, Pondicherry.

M. S. Ramaswamy, for Appellant.

The Public Prosecutor for Pondicherry, on behalf of State of Pondicherry.

The Court delivered the following

JUDGMENT.—The appellant herein, Ramaswami *alias* Rajavelu, was a dealer in Karaikal, a former French possession in India. In 1954, these possessions came under the *de facto* administration of the Government of India, by a treaty, and were being administered under the provisions of the Foreign Jurisdiction Act. In the course of 1956, for getting certain quota rights, for import of goods, from the Government, the appellant is alleged to have fabricated certain bills, forged certain signatures and certain departmental seals, thereby contravening Articles 147, 148, 150, 151, 164 and 405 of the French Penal Code. According to the procedure enacted for investigation of criminal offences in the French Code D' instruction Criminelle (Criminal Procedure Code), investigation by the *proces verbal* (investigation by the Police) was completed on 15th January, 1958. The next stage of investigation under the French Criminal Procedure Code is the investigation by the Judge D' instruction and this was commenced on 15th September, 1958 and subsequently completed. Thereafter adopting the procedure of the French Criminal

* Special Appeal (Criminal) No. 835 of 1964 (P.). 3rd December, 1964.

Procedure Code, the Judge D' instruction sent a report to the Procureur of the Republique, who, following the procedure enacted in Article 133 of the Code D' instruction Criminelle, placed the matter before the Chambre Des Mises En Accusation. The Jurisdiction of this Chamber, according to the provisions of the French Criminal Procedure Code, is explained in Article 217 and subsequent Articles of that Code. This Chamber has to consider the data gathered up to that time during the stage of *procès verbal* and during the enquiry by the Judge D' instruction. But before the Chambre Des Mises En Accusation, neither the accused nor the witnesses nor the complainant (Partie Civile), nor the Public Prosecutor, is entitled to be present. As per Article 231 of the Code of Criminal Procedure, if the facts so far ascertained, amount to a crime under the French law, and if the Chamber finds that the charges justify committal, it shall commit the accused for trial before the "Tribunal Criminal". After such committal, the accused will take his trial before the Tribunal. It is common ground that in this case this particular stage had been reached and the Chambre Des Mises En Accusation, by its order dated 13th November, 1961 decided that *prima facie* the charges for the several offences of fabrication and forgery, as mentioned above, had been made out and that the accused should be sent to the Tribunal Criminel at Karaikal for being tried according to law. At this stage, again conforming to the French law, the accused Ramaswami made a declaration before the Greffier en Chef (Registrar) at Pondicherry on 20th November, 1961 about his intention for appealing to the Court of Cassation at Paris. Subsequent to the *de jure* transfer of the former French Establishments to the Indian Union and the conferment on this High Court of the powers of the Court of Cassation in Paris, under the Pondicherry (Administration) Act, 1962, this appeal is now before this Court. The accused to whom notice of hearing of the appeal had been given was represented by a learned Counsel and the Public Prosecutor appeared for the State of Pondicherry.

At the outset, the learned Counsel for the appellant referred to some provision of the " Code De Procedure Penale " which embodies certain modified provisions of the old French Code of Criminal Procedure and which came into force in France and other French territories, in pursuance of certain amendments to the latter Code, carried out by the appropriate authorities in Paris, after the date when the former French Possessions in India came under the *de facto* jurisdiction of the Government of India in 1954, and before the *de jure* transfer of jurisdiction in 1962. These provisions will not have application to the present case.

The further argument of the learned Counsel for the appellant is based upon Articles 21 and 13 of the Indian Constitution, which will apply to the former French Possessions from the date of the *de jure* transfer, *i.e.*, 1st August, 1962. Article 21, found in the Chapter on Fundamental Rights, states that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 13 (3) (*a*) occurring in the same Chapter, defines " law " as including any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law. The contention of the appellant is that after the extension of the Constitution to Pondicherry, only the Indian Penal Code and Criminal Procedure Code should be applied for the trial of the accused in this case, and not the provisions of the French Code of Criminal Procedure or the French Penal Code. A brief reference can be made at this stage to the successive orders and enactments which define the scope and extent of the laws which have to be applied in the erstwhile French Possessions including Pondicherry. Article 5 of the French Establishments (Administration) Order, 1954, states :

> " All laws in force in the French Establishments or any part thereof immediately before the commencement of this Order and not repealed by paragraph 6 of the French Establishments (Application of Laws) Order, 1954, shall continue to be in force until repealed or amended by as competent authority."

The next stage was the Pondicherry (Administration) Act, 1962, which received the assent of the President of India on 5th December, 1962. Section 4 of the Act, contains an identical provision to Article 5, providing for the continuance of the

pre-existing laws until amended or repealed by a competent Legislature or other competent authority. In 1963, the President of India, acting under Article 240 of the Constitution, made a Regulation called "The Pondicherry (Laws) Regulation, 1963". under which several laws in force in the Indian Union, including the Criminal Procedure Code and the Indian Penal Code, were brought into force with effect from 1st October, 1963, in Pondicherry territory. This Regulation contains certain repealing and saving provisions of which we are concerned with sections 4 (1) and 4 (2) (*d*), which I extract below :

"4. (1) Any law in force in Pondicherry or any area thereof corresponding to any Act referred to in section 3 shall stand repealed as from the coming into force of such Act in Pondicherry ; and all the laws specified in the Second Schedule are hereby repealed.

(2) Nothing in sub-section (1) shall affect—

* * * * * * *

(*d*) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid."

It is clear that this repealing and saving provision has the effect of preserving, for the purpose of the procedure to be applied in this case, the provisions of the French Criminal Procedure Code (as well as the French Penal Code) notwithstanding the general rule that repealing and amending legislation for dealing with procedure will have retrospective effect, unlike similar legislation dealing with substantive rights, which will not have such an effect, unless there is a specific provision therefor. The President's Regulation consciously provided for such a retroactive effect on the procedural legislation, namely, the French Criminal Procedure Code which we have to refer to in this case.

Learned Counsel for the appellant next urged, with reference to Article 21 read with Article 13 (3) occurring in Part III of the Indian Constitution, that "established law" would mean an enactment which would have the force of law in the territory of the Indian Union and that the French Criminal Procedure Code was not such an enactment. It is obvious that this contention overlooks the provisions of the repealing and saving clause both in section 4 of the Pondicherry (Administration) Act, 1962, and section 4 (2) (*d*) of the Pondicherry (Laws) Regulation, 1963. In this connection the well-known principle of International Law relevant for the purpose is the one laid down as early as in *Mayor of Lyons* v. *East Indian Co.*[1]:

"It is agreed, on all hands, that a Foreign settlement, obtained in an inhabited country, by conquest, or by cession from another Power, stands in a different relation to the present question, from a settlement made by colonizing ; that is, peopling an uninhabited country.

In the latter case it is said that the subjects of the Crown carry with them the laws of England, there being, of course, no *lex loci*. In the former case, it is allowed that the law of the country continues until the Crown, or the Legislature, change it."

It is this principle that has been carried out successively in section 5 of the French Establishments (Administration) Order, 1954, section 4 of the Pondicherry (Administration) Act, 1962, and section 4 (2) (*d*) of the Pondicherry (Laws) Regulation, 1963. By the force of the aforesaid repealing and saving provisions, the pre-existing French law has become as much the established law in force in the territory of India within the meaning of Article 13 (3) (*a*) of the Constitution, as any other law of the Indian Union, like the Criminal Procedure Code or the Indian Penal Code. That the law thus given validity, was originally a law in force in what was foreign territory, will not affect the question of its being an established law in the territory newly added to the Indian Union. This reasoning is sufficient to dispose of the objection raised by the appellant's learned Counsel.

Further, by reference to the observations in *A. K. Gopalan's case*[2], the learned Counsel argued that while the Indian Criminal Procedure Code as extended to Pondicherry under the Presidential Regulation, will be "established law" within the

1. (1836) 1 Moor. Ind. App. 175 : 18 E.R. 66.
2. (1950) S.C.J. 174 : (1950) 2 M.L.J. 42 : (1950) S.C.R. 88.

meaning of Article 21 of the Constitution, the pre-existing French law will not have that character, even though it may be a law in force. He referred in particular to the observations of Patanjali Sastri, J., at page 205 of the Report. But it appears to me that the very observations of the learned Judge would go to show that the pre-existing French law, which is to be continued as the law for the newly annexed territories would be " established law ", in the light of the interpretation given to that term in the decision of the Supreme Court, particularly the observations of Patanjali Sastri, J. The following extract from the observations of the learned Judge makes the point clear :

> " In the first place, a satisfactory *via media* between the two extreme positions contended for on either side may be found by stressing the word ' established ', which implies some degree of firmness, permanence and general acceptance, while it does not exclude origination by statute. ' Procedure established by law' may well be taken to mean what the Privy Council referred to in *King Emperor* v. *Benoari Lal Sharma*[1], as the ordinary and well-established Criminal Procedure, that is to say, those settled usages and normal modes of proceeding sanctioned by the Criminal Procedure Code which is the general law of Criminal Procedure in the country. Their Lordships were referring to the distinction between trial by Special Courts provided by an Ordinance of the Governor-General and trial by ordinary Courts under the Criminal Procedure Code. It can be no objection to this view that the Code prescribes no single and uniform procedure for all types of cases but provides varying procedures for different classes of cases. Certain basic principles emerge as the constant factors common to all those procedure, and they form the core of the procedure established by law. I realise that even on this view, the life and liberty of the individual will not be immune from legislative interference, for a competent Legislature may change the procedure so as to whittle down the protection if so minded. But, in the view I have indicated, it must not be change *ad hoc* for any special purpose or occasion, but a change in the general law of procedure embodied in the Code. So long as such a change is not effected, the protection under Article 21 would be available....... "

Obviously, the pre-existing French law preserved for enforcement in these newly added territories, is not an *ad hoc* legislation designed to meet a particular contingency or a particular set of persons. It was law firmly and well established in that territory and having general acceptance under the well-known principles of International Law, which are explained in the decision cited earlier in *Mayor of Lyons* v. *East Indian Co.*[2]. Under those principles, the citizens of that territory possess a vested right to be governed by those provisions until such time a competent authority introduces new patterns of legislation.

I therefore hold that the objections referred to above are not valid. No grounds are made out to show that the procedure so far adopted is illegal or that subsequent hearing of the case of the appellant by the Criminal Court at Karaikal, in pursuance of the Committal (renvoi) by the Chambre Des Mises En Accusation, by the adoption of the pre-existing French Law, should be interdicted, or that a direction should be issued that for the subsequent trial the Indian Criminal Procedure Code, 1898, should be followed.

Before I part with this appeal, I must draw attention to a point urged by the learned Public Prosecutor for the State of Pondicherry regarding the scope of the powers of the Court of Cassation in Paris, when dealing with such a reference. The law on this subject is summarised in one of the well-known treatises " Delloz Repertoire Pratique ", in paragraph 491. It says that in contra-distinction with the order of a Judge D'instruction, definitive orders of the Chambres Des Mises En Accusation are susceptible to correction in Cassation when the renvoi (committal) by the Chamber is to the Court of Assizes. In such cases, revision by Cassation will be permissible either at the instance of the Public Prosecutor or of the accused on account of the several reasons enumerated in Article 408 of Code D ' instruction Criminelle, like the violation of provision of law or non-compliance with the provision of the D' instruction Criminelle, leading to nullity and so on. Where the committal is to the Correctionanelle Court, then also the Court of Cassation has jurisdiction to interfere under the general principles of law applicable in such cases. But, at the same time, recourse to the Court of Cassation cannot be had when the order of committal, while recording the particulars of the offences for which the

1. (1945) 1 M.L.J. 76 : L.R. 72 I.A. 57 : (1945) F.L.J. 1 : (1945) F.C.R. 161, 175.
2. 18 E.R. 66 : 1 Moor. Ind. App. 175.

accused has to be tried by the Court, has not dealt with any contested question of jurisdiction. The reason for this decision, according to the commentary of Dalloz, is that such committal should be treated merely as a preparatory step, before the actual trial.

Put in other words, what this commentary indicates is that the procedure so far adopted in this case, will correspond to the preliminary stage before the framing of a charge, such as what takes place before a Grand Jury, or during a preliminary enquiry before a Magistrate before committal to a Sessions Court under the Criminal Procedure Code in India. In such a case, where no question affecting jurisdiction has arisen for decision, but only a decision has been recorded for a *prima facie* purpose of framing a charge or charges, the Court of Cassation will not interfere.

In this case there is no written record of the Proceedings before the Chambre Des Mises En Accusation. According to section 225 of the Code D' instruction Criminelle, the decision of the Chambre Des Mises En Accusation has to be taken according to the majority vote and in the absence of the accused, the public and the Public Prosecutor. In other words, it is a decision arrived at a secret session of the Chamber and except the fact that by a majority they have decided that charges should be framed, it is not possible to know the reasons which weighed with them. No doubt, they should be deemed to have taken into account, for the purpose of their decision, all the material gathered during investigation up to that stage, namely, at the *proces verbal* and at the enquiry by the Judge D' instruction. No argument was advanced before me by the Counsel for the appellant that these data would not justify the committal by the Chambre Des Mises En Accusation.

The appeal is therefore dismissed.

P.R.N. —————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

Income-tax Officer, Central Circle I, Madras ... *Petitioner**

v.

P. Ramaratnam and others .. *Respondents.*

Income-tax Act (XLIII of 1961), sections 137 and 138.—Disclosure of information—Accused in a criminal case—Documents produced by the accused in the assessment proceedings of the employer—Summons to Income-tax Officer to produce the documents in proof of motive for the prosecution—Legality.

The Court summoned the Income-tax Officer at the instance of the accused to produce the documents that were filed before the Officer by the accused before April, 1964 in the assessment proceedings of their employer, in order to prove the motive behind the criminal case launched against them. Their case was that on account of their producing the documents and giving information to the Department the criminal case had been filed against them. On the question of their production and admissibility,

Held, the order of the Magistrate directing the Officer to produce the documents is correct.

Section 54 of the Income-tax Act of 1922 no doubt imposed an absolute prohibition against the Court from summoning the production of the documents in question.

But section 137 (5) of the Act of 1961 permits the voluntary disclosure of the particulars referred to in sub-section (1) by the person by whom the statement was made, or documents were produced.

The preservation of the rights envisaged under section 6 of the General Clauses Act as a result of repeal and re-enactment of section 137 of the Act of 1961 is not applicable as different intention appears by the modified restriction enacted in section 138 (2) of the Act of 1961 introduced by the Finance Act of 1964 that repealed section 137 of the Act of 1961.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Fifth Presidency Magis-

* Crl.R.C. No. 442 of 1965. 1st July, 1965.
(Crl.R.P. No. 429 of 1965).

trate, Egmore, Madras and dated 15th March, 1965 made on the Memorandum filed by the Income-tax Officer, Central Circle I, Madras, in C.C. No. 19295 of 1964.

J. Jayaraman for *V. Balasubrahmanyam*, Special Counsel for Income-tax, on behalf of Petitioners.

A. C. Muthanna for *Habibulla Badsha* and *E. S. Govindan*, for Respondents.

S. R. Srinivasan, for the Public Prosecutor, on behalf of the State.

The Court made the following

ORDER.—Petition is by the Income-tax Officer, Central Circle I, Madras, to revise the order of the Fifth Presidency Magistrate overruling his objection and directing him to produce the documents summoned by the Court. The documents were summoned at the instance of the accused in the case who actually produced them. The accused are prosecuted for offences of criminal breach of trust, criminal conspiracy, etc. They were employees under Dina Thanti, and their case is that on account of their producing the documents and giving information to the Income-tax Authorities the present criminal case has been filed against them. Thus the accused in the case rely on the documents to prove the motive for the prosecution being launched against them.

Section 137 of the Income-tax Act, 1961, as it stood would have been an obstacle in the way of the Court issuing summons for the production of the documents. But the said section, has been omitted under the Finance Act of 1964, which has, however, amended section 138. The learned Advocate for the petitioner, however, relied on section 6 of the General Clauses Act, 1897, in support of his contention that as the documents were produced before 1st April, 1964, his right and privilege not to produce the documents by virtue of section 137 of the Income-tax Act of 1961 before amendment by the Finance Act of 1964, would not be affected by virtue of the repeal of section 137 of the Income-tax Act of 1961 by the Finance Act of 1964.

Before proceeding to consider the said contention, it is necessary to consider whether even section 137 of the Income-tax Act, 1961, as it originally stood, would enable the petitioner to refuse to produce the documents. The learned Advocate for the petitioner mistakenly stated at the commencement that the documents were required for the purpose of prosecution, but if it were so, the case could have been disposed of on the short ground that section 137 (3) (i) would apply, and the Court was entitled to summon the documents. But the learned Advocate for the respondents-accused brought to my notice that the documents were not required for the prosecution, but, as stated already, required only to prove the motive put forward by the defence as to why the prosecution was launched against them. There is, therefore, no scope for invoking the exception in section 137 (3) (i) of the Income-tax Act of 1961 as it then stood.

The learned Advocate for the respondents relied on section 137, clause (5) of the Income-tax Act of 1961 prior to the repeal. Clause (5) of section 137 runs as follows :

" Nothing in this section shall be construed as prohibiting the voluntary disclosure of any particulars referred to in sub-section (1) by the person by whom the statement was made, the return furnished, the accounts or documents produced, the evidence given or the affidavit or deposition made, as the case may be."

The documents in this case were all produced by the respondents, and they are, therefore, entitled to rely on this clause. The learned Advocate for the petitioner relied on the decision in *Charu Chandra Kundu* v. *Gurupada Ghosh*[1], where it was held that having regard to section 54 of the Income-tax Act, 1922, the Court has no power to direct the Income-tax Authorities to discover documents and statements in assessment proceedings. It was argued by the Advocate for the appellant in that case that section 54 of the Income-tax Act of 1922 was enacted only for the protection

1. (1961) 2 S.C.J. 537 : (1961) M.L.J. (Crl.) An.W.R. (S.C.) 128: (1962) 2 S.C.R. 833, 628 : (1961) 2 M.L.J. (S.C.) 128 : (1961) 2

of the assessee, and if the assessee waives the privilege enacted for his protection, the prohibition contained therein will be inoperative. But this contention was repelled in that case on the ground that there is no such exception, express or implied, in the language of section 54 of the Income-tax Act of 1922 and that the prohibition imposed against the Court by the said section is absolute. But as pointed out at page 612 of the "Law and Practice of Income-tax" by Kanga and Palkhivala, V Edition, the above decision must now be read subject to the provisions of sub-section (5) which permits the voluntary disclosure of any particulars referred to in sub-section (1) by the person by whom the statement, affidavit or deposition was made, the evidence given, the return furnished or the accounts or documents produced, as the case may be. It is pointed out in that book that there was no provision in section 54 of the 1922 Act corresponding to sub-section (5) of section 137 of the Income-tax Act of 1961. It should be noted that even the assessees have no objection to the production of the documents by the petitioner.

I shall proceed to consider the contention raised by the learned Advocate for the petitioner on the strength of section 6 of the General Clauses Act. The Bench decision in *P. Kandiah Thevar* v. *Third Income-tax Officer*[1], relied on by both sides is a decision clearly against the petitioner. It was held in that decision that the protection regarding rights accrued under an old Act given by section 6 of the General Clauses Act is not unqualified as the said section 6 states that the repeal of an Act shall not affect any right or privilege accrued or acquired under an enactment so repealed unless a different intention appears. The Bench had to decide the amendment by which section 137 (3) (xxi) was introduced and it held that such contrary intention is apparent in the enactment of section 137 (3) (xxi) and so notwithstanding that the statement was made in proceedings under the old Act, its disclosure is permitted under the new Act. Though section 137 of the Income-tax Act of 1961 is repealed by the Finance Act of 1964, there is modified restriction by virtue of section 138, clause (2), introduced by the same Act.

For the foregoing reasons, the order of the Fifth Presidency Magistrate directing the petitioner to produce the documents is correct and there is no ground to interfere in Revision. The Criminal Revision Case is therefore dismissed.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

S. V. Ramakrishna Mudaliar and another .. *Plaintiffs**

v.

Rajabu Fathima Bukari and another .. *Defendants.*

Income-tax Act (*XLIII of* 1961), *sections* 137 *and* 138 *and Income-tax Act* (*XI of* 1922), *section* 54—*Disclosure of information—Documents, etc., produced under the provisions of the Income-tax Act—Production of and testimony in relation to such documents by public servant —Absolute prohibition notwithstanding waiver by assessee—Repeal and re-enactment of law—Rights accrued and obligations incurred under the prior law preserved—Account books filed in a civil suit—Genuineness—Initialled by the Income-tax Officer in relation to assessment of a third party—Testimony of Officer and production of connected assessment records—Inadmissible.*

In proof of the genuineness of the account books produced by the defendant in the suit, the defendant sought to examine the Income-tax Officer who had initialled those account books in 1957 in connection with the assessment of a third party assessee. A requisition was also sent to the Commissioner of Income-tax to make available the connected assessment records wherein the Income-tax Office would have noted the fact of calling for and examining the account books of the defendant. On the question of the admissibility of the evidence of the Income-tax Officer,

Held, the evidence of the Income-tax Officer is inadmissible.

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1. I.L.R. (1964) 1 Mad. 102 : 49 I.T.R. 665.

* C.S. No. 43 of 1962. 9th July, 1965

Under the provisions of the Income-tax Acts of 1922 and 1961 there was a prohibition against the Income-tax Officer being examined by the Court in respect of the matters in question and the prohibition continued notwithstanding the deletion of section 137 of the Act of 1961 by the Finance Act of 1964. The prohibition is absolute and in spite of the waiver on the part of the assessee himself the evidence of the Officer is totally inadmissible.

Under section 137 (5) itself there was no prohibition against a voluntary disclosure of any of the particulars in sub-section (1) by the person by whom the statement was made, return furnished, accounts or documents produced. It did not affect the prohibition against the Officer himself.

Section 54 (3) (of 1922 Act) or section 137 (3) (of 1961 Act) cannot also be relied upon because it cannot be said that the High Court in trying the suit and taking the evidence of the Officer is acting in execution of the Income-tax Acts of 1922 and 1961.

In considering the effect of repeal as enacted in section 6 of the General Clauses Act, the line of enquiry should be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them.

Section 138 (1) only deals with what the Commissioner may do when a party applies to him and does not touch the sphere covered by section 137 (1) of the Act of 1961 and cannot in any way be taken to be destroying the prohibition contained in section 137 (1) of the Act of 1961. The notification under section 138 (2) of the Act of 1961 also contains, in addition to the prohibition under the old law, a prohibition in respect of particular documents specified.

The Officer was under an obligation not to give evidence in Court relating to the matter in question and also had the right to claim immunity from appearance in Court and deposing to those matters. The Commissioner was also under an obligation and had also the right in respect of the production of the said documents.

M.P. Subramaniam, G. Ramakrishna and *K.L. Krishnan,* for Plaintiff.

Ramaprasad Rao and *Nainar Sundaram,* for 1st Defendant.

V. Thiyagarajan and *Narayan,* for 2nd Defendant.

V. Balasubrahmaniam, Special Counsel for Income-tax.

The Court delivered the following

JUDGMENT.—The question involved is the admissibility of the evidence of one Sri Marar, relating to the initials, which he is alleged to have affixed on 17th August, 1957 in some account books (Exhibits D-24 and D-25), which he perused in his capacity as Income-tax Officer, Second Circle, Madras. The question arises because of the provisions of section 54 of the Income-tax Act of 1922 and section 137 of the Income-tax Act of 1961. Section 137 of the Income-tax Act (XLIII of 1961) was omitted from the statute by section 32 of the Finance Act of 1964. Another question which is involved is whether the prohibition, which existed against the Income-tax Officer giving evidence under the provisions of section 54 of the Income-tax Act of 1922 and section 137 of the Income-tax Act of 1961, still continues, having regard to the provisions of section 6 of the General Clauses Act, 1897.

The facts necessary for the disposal of the questions are these. Mrs. Buhari, the first defendant in the suit, C.S. No. 43 of 1962, produced her account books, Exhibits D-24 and D-25, at a late stage, and applied for permission to condone the delay. One of the questions for the Court was whether any of the account books could be considered to be genuine. In that connection I happened to come across some initials in the said account books, which purported to be those of an Income-tax Officer, on 17th August, 1957. The initials are at page 43 of the day book (Exhibit D-24) and also find place at page 1 of the corresponding ledger (Exhibit D-25). There are seals of the Income-tax Officer on 17th August, 1957 on the said pages. Though some attack was made by the plaintiffs with respect to the seals, I felt that, so far as the initials of the Officer were concerned, their evidentiary value would stand on a higher footing, and, if the accounts were seen by the Officer on 17th August, 1957, that would go a long way to establish their genuineness. Accordingly, I permitted the first defendant to examine the Income-tax Officer for the above purpose.

The first defendant summoned the concerned Income-tax Officer, Sri Marar, who is now the Assistant Commissioner of Income-tax. In examination-in-chief he spoke to the fact of his having affixed his initials on 17th August, 1957, and added that he believed that he did so in verifying the assessment of another assessee, Buhari

Hotel, as a cross-verification. He was also cross-examined in part. This took place on 29th April, 1965. In the course of the cross-examination it was felt that, in order to enable the plaintiffs to test the veracity of his evidence, it was necessary to summon the connected assessment records, where he stated he would have noted the fact of summoning and examining the account books of Mrs. Buhari (Exhibits D-24 and D-25). For this purpose a requisition was sent to the Commissioner of Income-tax to give those assessment files to Sri Marar, and the case was adjourned to 30th April, 1965, the last working day before the vacation. On that day, somehow, Sri Marar could not come, and the case came up after the reopening of the Court after vacation. But even on 30th April, 1965, Sri M.P. Subramaniam, learned Counsel for the plaintiffs, brought to my notice the decision of the Supreme Court in *Charu Chandra Kundu* v. *Gurupada Ghosh*[1], and urged that, having regard to the provisions of the Income-tax Act of 1922 and the Income-tax Act of 1961 the evidence of Sri Marar would be totally inadmissible. I felt that, having regard to the importance of the question, and the fact that the Commissioner of Income-tax also was concerned, it was desirable to hear the arguments of Sri V. Balasubramaniam, Standing Counsel for the Commissioner. I had the benefit of his able arguments, supplemented by the arguments of Sri M.P. Subramaniam, and also the counter arguments of Sri T. Ramaprasada Rao for the first defendant.

The stand of Sri Balasubramaniam, appearing for the Commissioner, is that in view of the provisions of section 54 of the Income-tax Act of 1922 and section 137 of the Income-tax Act of 1961, the evidence of Sri Marar would be totally inadmissible. He further contended that this prohibition continues, notwithstanding the omission of section 137 of the Income-tax Act of 1961 by section 32 of the Finance Act of 1964, having regard to the provisions of section 6 of the General Clauses Act. He also stated that, so far as Sri Marar was concerned, he was under the impression that he was merely asked to give evidence in his private capacity, and that consequently the prohibition would not apply. But now that the objection has been brought to his notice, Sri Marar also claims the privilege of exemption from giving evidence. On the contrary, the contention of Sri Ramprasada Rao is that, under the provisions of the Indian Evidence Act, the evidence of Sri Marar is admissible, and that the position is not altered by the provisions of the Income-tax Act. I may say at once that I have no difficulty in holding that the evidence of Sri Marar is totally inadmissible, and should be disregarded, and that it will not be legal to continue to examine him further. I accept the contention of Sri V. Balasubramaniam that under the provisions of the Income-tax Acts of 1922 and 1961 there was a prohibition against Sri Marar being examined by the Court in respect of the matter in question, and that the prohibition continues, notwithstanding the deletion of section 137 of the Income-tax Act of 1961 by section 32 of the Finance Act of 1964.

I shall first discuss the position as it stood before the deletion of section 137 of the Income-tax Act of 1961 by section 32 of the Finance Act of 1964. Section 54 of the Income-tax Act of 1922 enacted as follows :

"*Section* 54 (1) : All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872 (I of 1872), no Court shall, save as otherwise provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) If a public servant discloses any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record, he shall be punishable with imprisonment which may extend to six months and shall also be liable to fine."

Sub-section (3) ran thus :—

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1. (1961) 2 S.C.J. 537 : (1961) M.L.J. (Crl.) 628 : (1961) 2 M.L.J. (S.C.) 128 : (1961) 2 An. W.R.(S.C.) 128 : (1961) 2 S.C.R. 833.

"Nothing in this section shall apply to the disclosure........"

There followed several clauses, which, for the present, may be assumed not to apply. The Income-tax Act of 1961 repealed the Income-tax Act of 1922, but the repeal is immaterial for the particular question before us, because the provisions of section 54 are re-enacted in section 137. Section 137 (1) and (2) ran thus :

"*Section* 137 (1) : All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act or in any evidence given, or affidavit or deposition made in the course of any proceedings under this Act, other than proceedings under Chapter XXII, or in any record of any assessment proceeding or in any proceeding relating to recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872 (I of 1872), no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof.

(2) No public servant shall disclose any particulars contained in any such statement, return, accounts, documents, evidence, affidavit, deposition or record."

Sub-section (3) provides for exceptions, which again may be assumed, for the present, not to apply to us.

In *Charu Chandra Kundu* v. *Gurupada Ghosh*[1], the question arose in a civil suit, in which the appellant before the Supreme Court was the defendant. In support of his defence in the suit he desired that the statement made by the plaintiff in the suit on 22nd February, 1950 (respondent in the Supreme Court) in certain proceedings relating to the assessment of income-tax of the appellant for the year 1949-50, be produced before the Court. The Commissioner of Income-tax took the objection that, in view of section 54 of the Income-tax Act of 1922, he could not be required to produce the statement in question. The trial Court upheld the objection. The High Court of Judicature at Calcutta confirmed that view. The appellant took the matter in appeal to the Supreme Court. Their Lordships of the Supreme Court held that there was an express interdict against the Court requiring production of the documents, and that therefore the Subordinate Judge was right in declining to accede to the request of the appellant. Then follows this passage, which is impotant for us:

"Mr. Chatterjee appearing on behalf of the appellant contends that section 54 is enacted only for the protection of the assessee, and if the assessee waives the privilege enacted for his protection, the prohibition contained therein will be inoperative. But there is no such exception, express or implied, in the language used by the Legislature. The prohibition imposed against the Court by section 54 is absolute ; its operation is not obliterated by any waiver by the assessee in whose assessment the evidence is tendered, document produced or record prepared."

Mr. Chatterjee then relied on *Rama Rao* v. *Venkataramayya*[2], where it was held that certified copies of statements made to the Income-tax Officer, which had been furnished to the assessee by the Income-tax Officer, were admissible under section 65 (*e*) of the Evidence Act as secondary evidence of public documents under section 74 of the Evidence Act. Their Lordships of the Supreme Court observed that the question before them was different, namely, whether the original statements from the records of the Income-tax Authorities could thus be summoned by the assessee.

Though the above decision was rendered only with reference to section 54 of the Act of 1922, it would equally apply to section 137 (1) of the Act of 1961. I may add that section 137 (5) of the Act of 1961 would not affect this result because that merely says that there is no prohibition against a voluntary disclosure of any of the particulars in sub-section (1) by the person by whom the statement was made, return furnished, accounts or documents produced. In other words, it does not affect the prohibition against the Income-tax Officer himself.

In view of this clear pronouncement by the highest Court in the land, it is not necessary to discuss the position further. It is clear that, if the evidence of Sri Marar would come under the terms of section 54 of the Income-tax Act of 1922 or section 137 of the Income-tax Act of 1961, it would be totally inadmissible, notwithstanding the fact that the concerned assessee, namely, Buhari Hotel, in connection with whose

1. (1961) 2 S.C.J. 537 : (1961) M.L.J. (Crl.) 628 : (1961) 2 M.L.J. (S.C.) 128 : (1961) 2 An. W.R. (S.C.) 128 ; (1961) 2 S.C.R. 833.

2. (1940) 2 M.L.J. 257 : I.L.R. (1940) Mad. 969.

assessment the alleged initials were affixed, has no objection to Sri Marar giving such evidence. On this point it is clear that the evidence of Sri Marar would certainly come within the four corners of section 54 of the Income-tax Act of 1922 or section 137 of the Income-tax Act of 1961. It is clear from his evidence that he affixed these initials in his capacity as Income-tax Officer when making the assessment of Buhari Hotel, or may be some other assessment. The reception of such evidence is precisely what has been prohibited by the provisions of section 54 of the Income-tax Act of 1922 and section 137 of the Income-tax Act of 1961. It is impossible to hold that he could give such evidence in his private capacity. I do not, of course, say that, wherever the initials of an Income-tax Officer are found, the Income-tax Officer cannot give evidence. We may, for our present purpose, envisage a case, where, in his capacity as an ordinary citizen, totally unconnected with his duties as an Income-tax Officer, he affixed his initials on some document, as a witness to some other private transaction. In such a case, the prohibition under section 54 of the Income-tax Act of 1922 or section 137 of the Income-tax Act of 1961 cannot apply. This, however, is clearly not such a case. It comes squarely within the four corners of the provision in question.

Even in the chief-examination of Sri Marar it was elicited that the initials were affixed in the course of assessment proceedings of Buhari Hotel. But even if the chief-examination had stopped merely with eliciting answers such as the following:

"These are my initials, which I affixed on 17th August, 1957, when I saw those books."

without eliciting the fact that the initials were affixed in the course of assessment of Buhari Hotel, that would not, for practical purposes, be of much use, because, though such evidence, standing by itself would be admissible in chief-examination, it would have to the tested in cross-examination, and in the course of such examination it would be elicited that the initials were affixed in the course of assessment of Buhari Hotel, and further questions would have to be put to verify such evidence. Such evidence in cross-examination would clearly be prohibited under section 54 of the Income-tax Act of 1922 and section 137 of the Income-tax Act of 1961. Sri Ramprasada Rao suggested that the cross-examination might be done without trenching on the prohibited area, and that the evidence which did not trench on the prohibited area could be taken as admissible, excluding the rest. But the Court must do justice, and if in order to do justice, it is necessary to elicit that the initials were affixed in some assessment proceeding, and to verify that evidence by reference to the records it would trench on the prohibited area, and there cannot be effective cross-examination. If there can be no effective cross-examination, the principles of natural justice require that the other evidence also, given in chief-examination, cannot be looked into. The whole evidence will have to be excluded.

Sri Ramprasad Rao then urged that this evidence would come within clause (*b*) of sub-section (3) of section 54, and similarly under clause (ii) of sub-section (3) of section 137. These provisions run thus :

"*Section* 54 (3) : Nothing in this section shall apply to the disclosure :—

. . . .

(*b*) of any such particulars to any person acting in the execution of this Act or of the Taxation on Income (Investigation Commission) Act, 1947 (XXX of 1947), where it is necessary or desirable to disclose the same to him for the purposes of either this Act or the Taxation on Income (Investigation Commission) Act, 1947."

Section 137 (3) : Nothing in this section shall apply to the disclosure—

. . . .

(ii) of any such particulars to any person acting in the execution of this Act, where it is necessary or desirable to disclose the same to him for the purposes of this Act."

Sri Ramprasad Rao submitted that the words "any person" in the above provisions would include the Court, and for this purpose he relied on a decision of this Court in *Seshavatharam* v. *Venkata Rangayya*[1], which held that the words "appropriate authority" in section 54 (3) (*m*) would include a Court. That provision ran thus :

1. (1946) 2 M.L.J. 257 : I.L.R. (1947) Mad. 393.

"Nothing in this section shall apply to the disclosure of so much of such particulars, to the appropriate authority, as may be necessary to establish whether a person has or has not been assessed to Income-tax in any particular year or years, where under the provisions of any law for the time being in force such fact is required to be established."

That provision was introduced shortly after the enactment of the Madras Agriculturists' Relief Act, (IV of 1938), in order to enable the Collector to give a certificate whether a person had been assessed to income-tax in a particular year or years, which was a necessary criterion for claiming the benefits of the Act. The Bench of this Court held that the appropriate authority would not be confined to a Collector, but would include a Court also, and would empower the Court to call for necessary particulars from the Income-tax Officer. But this decision will not help us, because under section 54 (3) (*b*) the person concerned must be acting in execution of that Act of 1922, and similarly under section 137 of the Act of 1961. It cannot, however, be said that this Court in trying the suit and in taking the evidence of Sri Marar is acting in execution of the Income-tax Act of 1922 or the Income-tax Act of 1961. No other provision under section 54 (3) or section 137 (3) has been relied on by Sri Ramprasad Rao. The result, therefore, is that under the law as it stood before the omission of section 137 by section 32 of the Finance Act of 1964, the evidence of Sri Marar would be totally inadmissible. The question is whether in view of the omission of section 137 of the Income-tax Act of 1961 by section 32 of the Finance Act of 1964, the position is altered.

Here it is necessary to quote the relevant portion of section 6 of the General Clauses Act :—

"*Section* 6 : Where this Act, or any Central Act or Regulation made after the commencement of this Act, repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

....

(*c*) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed."

The principle of this enactment would apply even to a case of repeal of one of the sections of the Act of 1961, namely, the omission of section 137 by the Finance Act of 1964. The Supreme Court has indicated in *State of Punjab* v. *Mohar Singh*[1], that unless a contrary intention appears in the repealing statute, the consequences of section 6 of the General Clauses Act will apply, and that it is not necessary that the repealing new Act should expressly keep alive old rights and liabilities. They say that the line of enquiry should be, not whether the new Act expressly keeps alive old rights and liabilities, but whether it manifests an intention to destroy them. Leaving aside for a moment the question whether there is anything in the Finance Act of 1964 disclosing a different intention, it is clear that under section 6 (*c*) of the General Clauses Act, the inadmissibility of the evidence of Sri Marar will continue, notwithstanding the omission of section 137 of the Income-tax Act of 1961 by the Finance Act of 1964. The matter can be looked at, first, from the point of view of the Income-tax Officer himself, and secondly, from the point of view of the Commissioner of Income-tax. From the point of view of the Income-tax Officer, he was under an obligation not to give evidence in Court relating to the initials in question, and the circumstances under which they were affixed. This obligation accrued or was incurred under section 54 of the Income-tax Act of 1922 on 17th August, 1957 itself, in respect of the initials, because that was the Act that was in force then, and that obligation continued when the Act of 1922 was repealed and the Act of 1961 was enacted. This obligation of the Income-tax Officer was correlated to the corresponding right of the assessee concerned, namely, Buhari Hotel, to forbid the Income-tax Officer giving evidence about such initials. We have seen from the observations of the Supreme Court in *Charu Chandra Kundu's case*[2] that prohibition imposed against the Court from taking the evidence of the Income-tax Officer was absolute and could not be obliterated by any waiver of the assessee. This obligation

1. (1955) S.C.J. 25 : (1955) 1 S.C.R. 893 at 899.
2. (1961) 2 M.L.J. (S.C.) 128 : (1961) 2 S.C.J. 537 : (1961) M.L.J. (Crl.) 628 : (1961) 2 An.W.R. (S.C.) 128 : (1962) 2 S.C.R. 833.

of the Income-tax Officer not to give evidence was there even apart from the corresponding right of the assessee to forbid him to give evidence. The prohibition was enacted in public interest to enable a full and true disclosure to be made by the assessee. That was why it was not waivable by the assessee.

The matter could also be considered as a right of the Income-tax Officer to claim immunity from appearing in Court and being asked to give evidence about it, and submit himself to cross-examination. The Income-tax Officer could claim that this right continued, notwithstanding the omission of section 137 of the Income-tax Act of 1961, by virtue of section 6 (*c*) of the General Clauses Act. I am inclined to think that Sri Marar was ignorant of the true legal position when he gave evidence on 29th April, 1965 and did not claim such a privilege. In such a case, at least, it cannot be said that he is precluded from claiming the privilege now, as he wants to.

The question could also be considered from the point of view of the Commissioner of Income-tax, who had both a right to refuse to produce the documents before the Court, as also an obligation not to produce them before the Court. The right and the obligation would continue by virtue of section 6 (*c*) of the General Clauses Act. If the Commissioner cannot be asked to produce these records, to that extent it would not be possible to cross-examine Sri Marar effectively, and, on the principles of natural justice, the evidence already recorded cannot be taken into account.

The question now is whether there is anything in the Finance Act of 1964 disclosing an intention contrary to that enacted under section 6 (*c*) of the General Clauses Act. The relevant provision, which may have to be considered, is section 33 of the Finance Act of 1964, which runs thus :

" *Section* 33 : For section 138 of the Income-tax Act, the following section shall be substituted, namely :—

' 138. *Disclosure of information respecting assessees* :

(1) Where a person makes an application to the Commissioner in the prescribed form for any information relating to any assessee in respect of any assessment made either under this Act or the Indian Income-tax Act, 1922, on or after the 1st day of April, 1960, the Commissioner may, if he is satisfied that it is in the public interest so to do, furnish or cause to be furnished the information asked for in respect of that assessment only and his decision in this behalf shall be final and shall not be called in question is any Court of law.

(2) Notwithstanding anything contained in sub-section (1) or any other law for the time being in force, the Central Government may, having regard to the practices and usages customary or any other relevant factors, by order notified in the Official Gazette, direct that no information or document shall be furnished or produced by a public servant in respect of such matters relating to such class of assessees or except to such authorities as may be specified in the order'."

Actually, there does not appear to have been any notification under section 138 (2) in respect of the matter with which we are dealing. But that apart, in view of the decision of the Supreme Court in *State of Punjab* v. *Mohar Singh*[1], it is clear that, even in a case where there is a notification under section 138 (2), it will not mean that the prohibition against the production of the records by the Income-tax Officer is confined to the documents specified in such a notification. According to the criterion of the Supreme Court in *State of Punjab* v. *Mohar Singh*[1], the limited prohibition contained in the notification under section 138 (2) cannot be taken as destroying the prohibition under the old law, namely, section 137 of the Act of 1961. Rather, the correct view would be that, in addition to the old law, the notification under section 138 (2) also contains a prohibition in respect of particular documents specified. As for section 138 (1), that too cannot be taken as in any way destroying the prohibition contained in section 137 of the Income-tax Act of 1961. Section 138 (1) deals only with what the Commissioner may do when a party applies to him, and does not touch the sphere covered by section 137 (1) of the Act of 1961, which lays down the prohibition of evidence or documents being tendered in Court by the Officer.

The result, therefore, is that the evidence of Sri Marar is totally inadmissible, and will have to be disregarded.

V.S. ——— *Ordered accordingly.*

1. (1955) S.C.J. 25 : (1955) 1 S.C.R. 893.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

The Kannan Devan Hills Produce Company, Limited, Munnar, Kerala .. *Petitioner**

v.

The State of Madras represented by the Agricultural Income-tax Officer, Batlagundu and another .. *Respondents.*

Madras Agricultural Income-tax Act (V of 1955), *section* 2—*Tea estate—Areas spread over Madras and Kerala States and run as single unit—Same basis for computation of income for Union income-tax—Different computation, in isolation, for Madras agricultural income-tax—Whether justified.*

The assessee carrying on business of tea planting in India had a Tea estate, among others, run as a single unit and situated partly in Kerala and partly in Madras State, 1,006-06 acres in Kerala and 36-40 acres in Madras. For the assessment years 1956-59, the Agricultural Income-tax Officer adopted the computation made by the Central Income-tax Officer in determining the income as under the income-tax, but for the assessment year 1960-61 departing from the computation made under the Income-tax Act, in regard to the portion of the estate situated in the Madras State, substituted a different computation for the assessment under the Madras Act. This was confirmed by the Appellate Authority. The Tribunal on further appeal made some rectifications and remanded the matter to the Income-tax Officer. Pursuant to this, re-assessment proceedings also, were sought to be initiated for the assessment years 1956-59 under section 35 of the Act.

The assessee came to the High Court by way of revision in respect of assessment year 1960-61 and in respect of notice as to re-assessment issued for the other years, applied under Article 226 of the Constitution to quash the notices.

[The computation under Central Income-tax Act was made treating the estate as a single unit. Separate accounts showed the yield of tea in the different areas including the Madras portion. The produce and sale attributable to Madras area were calculated on the value of the yield in that area. The expenditure was apportioned between the areas on the basis of acreage. The total loss for the entire unit in question was computed by Central Income-tax Officer and thereafer the proportion of the loss attributable to the Madras portion was worked out on the basis of yield giving a net loss.

According to the Agricultural Income-tax Officer this method of computation did not take into account the fact that the Kerala portion yield per acre was less than the Madras portion. He calculated by valuing the crop yielded by the Madras area. Small items disallowed by the Central Income tax Officer were deducted and other small additions made by the Central Income-tax Officer were added on a proportionate acreage basis and net profit for the Madras State portion was arrived at. Depreciation and development was deducted from this, after apportionment on acreage basis. 60 per cent. of the net amount available as profit by this computation was taken to be the agricultural income.

The Tribunal gave a few instances of items of expenditure, which were to be apportioned on acreage basis, and a few items of expenditure to be apportioned on yield basis, and then directed the Appellate Authority to receive the remaining items of expenditure and find out whether they were suitable for being apportioned under one or other basis, acreage or yield.]

Held : The method of computation adopted by the Agricultural Income-tax Officer or the on indicated by the Tribunal in remand is wholly unfair, a narrow one and cannot be supported frome the point of view either of business or of making proper assessment to tax.

Cutting up individual items of expenditure for the estate as a whole, into small fractions, on acreage basis for the small area of the estate situate in Madras State, and computing profits and loss separately for that small area is opposed to the business policy adopted by the assessee in running the estate as one unit. The expenses of the supervisory and clerical staff, running a factory for curing, medical services, ameliorative services like creches for children, cannot be apportioned on acreage basis. The fact that the Madras areas showed a higher yield per acre than the Kerala area of the estate cannot be a valid reason for departing from the computation made under the Income-tax Act.

The apportionment of the final loss on the basis of the value of the produce, as the receipts are on the basis of the yield, cannot be challenged.

The question whether the computation made by the Central Income-tax Officer would be legally and *ipso facto* binding on the Agricultural Income-tax Officer making assessments under the Act was not finally decided.

Petition under section 54 (1) of the Madras Agricultural Income-tax Act, 1955 praying the High Court to revise the order of the Agricultural Income-tax Appellate Tribunal, Madras dated 4th February, 1963 and made in Appellate Tribunal Appeal No. 122 of 1962 against the order relating to Assessment year 1960-61 in Appeal No. 126 of 1961-62 dated 11th July, 1962 on the file of the Assistant Commissioner (Agricultural Income-tax), Madurai (G.I.R. 10-K of

* Tax Case No. 146 of 1963 (Revn. No. 98 of 1963) and W.P. Nos. 698 to 700 of 1963. 9th December, 1964.

1960-61 dated 10th January, 1962 on the file of the Agricultural Income-tax Officer, Batlagundu, Appeal No. 126 of 1961-62, Assistant Commissioner of Agricultral Income-tax, Madurai).

V. K. Thiruvenkatachari for *K. C. Jacob, S. K. L. Ratan, Thomas Vallappally* and *J. Satyanarayana*, for Petitioner.

G. Ramanujam for the Government Pleader, on behalf of Respondent in T.C. No. 146 of 1963.

Additional Government Pleader, on behalf of Respondent in each of the Writ Petitions.

The Judgment of the Court was delivered by

Ramakrishnan, J.—These four cases were heard together as the points in controversy are the same. Messrs. Kannan Devan Hills Produce Company, Limited, is the assessee and will be referred to as the petitioner in all these cases. The petitioner is a company incorporated in Great Britain and carries on the business of tea planting in India. Its headquarters office in India is in Munnar in Kerala State. It owns tea estates situated in the States of Assam, Kerala and Madras. One of the estates belonging to the petitioner is known as Chittavurrai Estate comprising of 1,043 acres of tea plantation. Out of this, 1,006-60 acres are situated in Kerala State, while the balance of 36-40 acres are situated in Madras State. According to the petition Chittavurrai Estate is worked as one unit. It has only one factory for manufacturing the tea grown in Kerala and the Madras portions of the estate. The managerial, supervisory and clerical staff and the estate labour force, are combined for the whole estate. The expenses are incurred for the maintenance of the estate as one unit and the produce of the entire estate is manufactured and sold together. Common accounts are maintained for the whole estate, and there are no separate accounts for the Madras portion of the estate. The accounting period of the petitioner is the year ending 30th November. The accounts are kept on a mercantile basis. Assessment to agricultural income-tax was made by the Agricultural Income-tax Officer, Batlagundu, in Madurai district, on the petitioner, for the three assessment years 1956-57 to 1958-59.

A brief reference can be made at this stage to the definition of "agricultural income" so far as it is concerned. Under Article 366 (1) of the Constitution "agricultural income" means agricultural income as defined for the purposes of the enactments relating to Indian income-tax. Section 2 (2) of the Indian Income-tax Act defines "agricultural income". This definition is incorporated in the corresponding definition in section 2 of the Madras Agricultural Income-tax Act. Section 59 of the Indian Income-tax Act empowers the Central Government to make Rules to prescribe the manner and the procedure by which income, profits and gains shall be arrived at in the case of income derived in part from agriculture and in part from business. It is well-known that tea is a commodity which has a poor market in its raw or green condition. It becomes a valuable marketable product only after it has been subjected to curing by an industrial process in a factory. Exercising their power under section 59 of the Income-tax Act the Central Government framed rule 24 which states :

> "Income derived from the sale of tea grown and manufactured by the seller in the taxable territories shall be computed as if it were income derived from business, and 40 per cent. of such income, shall be deemed to be income, profits and gains liable to tax :
>
> Provided that in computing such income an allowance shall be made in respect of the cost of planting bushes in replacement of bushes that have died or become permanently useless in an area already planted, unless such area has previously been abandoned."

It would thus appear that what is assessable as agricultural income in the case of tea will be the remaining 60 per cent. after 40 per cent. had been arrived at as income attributable to business, under rule 24 of the Rules framed under the Indian Income-tax Act. As pointed out by the Supreme Court in *Karimtharuvi Tea Estates, Ltd.* v. *The State of Kerala*[1] of the income so computed (under the Indian Income-tax Act), under rule 24, 40 per cent. is to be treated as income

1. (1963) 1 I.T.J. 169 : (1963) 1 S.C.J. 265.

liable to income-tax, and it would follow that the other 60 per cent. will alone be deemed to be agricultural income within the meaning of that expression in the Income-tax Act.

For the first three of the assessment years mentioned above, the Agricultural Income-tax Officer, Batlagundu, in substance, accepted the computation, by Central Income-tax Officer, and took only the balance 60 per cent. for the purpose of agricultural income. There were small corrections rectified under section 36 (1) but, as already mentioned, the broad principle followed for the first three years was that the computation of the Central Income-tax Officer was accepted. But when it came to the fourth assessment year, *i.e.*, the assessment year 1960-61, the Agricultural Income-tax Officer, Batlagundu came to the conclusion that the basis of computation adopted by the Central Income-tax Authority for computing the proportion of income under the Indian Income-tax Act attributable to 36-40 acres of Chittavurrai Estate situated in the Madras State was incorrect, and substituted a different computation for the purpose of calculating the income under the Indian Income-tax Act, and after such a computation, he took 60 per cent. of it as agricultural income assessable in Madras State. The assessment thus made was confirmed by the Assistant Commissioner of Agricultural Income-tax. The matter was then taken to the Agricultural Income-tax Appellate Tribunal, which however set aside the assessment and remanded the case to the Assistant Commissioner for disposal in the light of certain observations made by the Tribunal. The details of these observations we will refer to presently in this judgment. Thereafter adopting the view expressed by the Agricultural Income-tax Officer for the assessment year 1960-61, the Department proposed to re-assess the assessments made for the three earlier years 1956-59 and issued three notices under section 35 of the Agricultural Income-tax Act. T.C. No. 146 of 1963 is filed by the petitioner against the order of the Agricultural Income-tax Appellate Tribunal in regard to the assessment for the year 1960-61. The three Writ Petitions are filed respectively for the three years of assessments, *viz.*, 1956-57 to 1958-59, praying for the issue of a writ of prohibition restraining the Agricultural Income-tax Officer, Batlagundu, from proceeding further in pursuance of the notices issued under section 35 of the Act for re-assessment.

It is contended by the petitioner that under law the computation made by the Central Income-tax Officer is binding on the Agricultural Income-tax Officer for computing agricultural income on tea, and that in any event, the computation made by the Agricultural Income-tax Officer for 1959-60 is erroneous. The common questions that arise in all the four cases are whether the Agricultural Income-tax Officer, Batlagundu, was justified in re-opening the computation of income on tea under the Indian Income-tax Act so far as the portion of Chittavurrai Estate 36-40 acres situated in Madras State is concerned and secondly whether the computation made by the Agricultural Income-tax Officer for the year 1960-61 (subject-matter of T.C. No. 146 of 1963) is erroneous.

Before dealing with the first point, we will put down briefly the computation adopted by the Central Income-tax Authority. There are separate accounts to show the yield of tea in the different areas including the Madras portion of 36-40 acres. The company apportioned the expenses between Assam, Kerala and Madras on the basis of acreage of total. But the proceeds of the sale of the crop attributable to the Madras area were calculated on the value of the yield of that area. Crop proceeds for the whole of Chittavurrai came up to £94,914-0-11. The expenditure in the Calcutta and Cochin agency (where sales are effected) and the expenditure in the United Kingdom (where the head office of the company is situated) were deducted. Calculated on acreage basis for this estate, it came to £99,725-6-0. This resulted in a loss of £4,811-5-1 or Rs. 64,150. Out of this Rs. 2,325 (United Kingdom) was disallowed by the Central Income-tax Officer and the balance was Rs. 61,825. Depreciation for building, machinery, etc., and development rebate were deducted and profit on sale of assets was added and the net amount came in Indian Currency to Rs. 9,78,602. The proposition of this expenditure for Chittavurrai Estate was calculated on the basis of the acreage giving Rs. 40,630. The total loss therefore, for, Chittavurrai came to Rs. 1,02,455 (Rs. 61,825 plus....) There-

after, the proportion of this loss attributable to the Madras portion of the Chittavurrai Estate was worked out on the basis of the yield. The yield was 29,000 lbs. for 36-40 acres in Madras State against 5,68,310 lbs. for whole estate of 1,049 acres. The proportion of the loss for the Madras State was worked out to Rs. 5,210. 40 per cent. of this was taken as income for assessment to Central income-tax in respect of the Madras portion and the remaining 60 per cent. had to be treated as the agricultural income for the Madras portion giving a loss of Rs. 3,126. A small amount of Rs. 327 was thereafter deducted from this amount for land revenue, etc., giving a net loss of Rs. 2,799.

In the opinion of the Agricultural Income-tax Officer, the above method of computation (proposed by the assessee, and substantially accepted by the Central Income-tax Officer) was incorrect. It did not take into account the significant fact that the Kerala area of the estate yielded only 656 lbs. per acre, while the Madras portion of the estate yielded 790 lbs. per acre. According to the Agricultural Income-tax Officer, the apportionment of the expenditure at successive stages treating the whole of Chittavurrai as one unit has resulted in a loss for the Madras State portion and profit for the Kerala State portion. We must point out here, that the computation by the Central Income-tax Authority, in fact showed a loss for the entire Chittavurrai estate. The reference by the Agricultural Income-tax Officer to a profit in Kerala, must evidently refer to a profit on all the estates of the petitioner in Kerala State. Thereafter the Agricultural Income-tax Officer made a re-calculation for computing the income. He proceeded thus. Value of the crop from 36-40 acre-of Chittavurrai Estate in Madras State was taken as £ 4,858. Thereafter a computation of the different items of expenditure for 36-40 acres in the Madras State was made on acreage basis and the total expenditure was determined as £3,480. This resulted in a profit of £ 1,378 or Rs. 18,373. Small items disallowed by the Central Income-tax Officer were deducted and other small additions made by the Central Income-tax Officer were added on a proportionate acreage basis, and net profit of Rs. 18,477 for the Madras State portion was arrived at. Depreciation and development rebate amounting to Rs. 1,418 was deducted from this, after apportionment on acreage basis. The net amount available as profit by this computation was Rs. 17,059 out of which 60 per cent. for the agricultural income was taken as Rs. 10,235.

We have given in the appendix to this judgment the working sheet for the two computations. It may be observed that the Central Income-tax Officer worked out the loss for the purpose of Central income-tax treating Chittavurrai as a unit. The income was the value of the produce of that estate; the expenditure was calculated for the estate as a whole on an acreage basis wherever separate figures for the estate were not available. After the total loss was arrived at, the proportion for the portion was calculated on the proportion of the yield of the Kerala portion to the total yield from the estate. On the other hand, the Agricultural Income-tax Officer has taken the value of the produce from the Madras portion as the gross receipt. From this, he has deducted every items of expenditure allowed by the Central Income-tax Officer, but re-calculated it for the Madras portion on the basis of acreage. By doing so, there resulted profit. The fact that the Madras area showed a higher yield per acre than the Kerala area of the estate was given by the Agricultural Income-tax Officer as the reason for making this departure. But in our view that cannot be a valid reason for the different computation adopted by the Agricultural Income-tax Officer. The area in the Madras State is only a small fraction of the area of the entire estate. It might be possible that this area is more fertile or had received favourable and timely rainfall. On the other hand, the Kerala area might have suffered vicissitudes like excessive rain or land-slides affecting the crops on some portion. The estate as a whole has been maintained and run by the petitioner as a single unit. In the affidavit of the petitioner, in W.P. No. 700 of 1963 he stated :

"4. The tea area in the Madras State is only a small portion of the petitioner's Chittavurrai Estate comprising 1,043 acres of tea plantation. Of this area 1,006-60 acres of tea are situated in Kerala State while the balance 36-40 acres of tea are situated in Madras State.

5. The Chittavurrai Estate is worked as one unit. The estate has only one factory for manufacturing the tea grown in the Kerala and the Madras portions of the estate. The managerial and

supervisory and clerical staff and the estate labour force, all work for the whole estate. The expenses are incurred for the maintenance the estate as one unit and the produce of the estate manufactured and sold together. Common accounts are maintained for the whole estate. Separate accounts are not maintained for the Madras portion of the estate."

This statement has not been challenged in the counter-affidavit . Cutting up such individual items of expenditure for the estate as a whole, into small fractions, on acreage basis for the small area of the estate situated in Madras State and computing profit and loss separately for that small area, is opposed to the business policy adopted by the assessee, in running the estate as a unit. It is also wholly impractical and would work serious hardship. Expenses of the supervisory and clerical staff cannot be apportioned on acreage basis. The expenses of running a common factory for curing cannot be apportionment on acreage basis. Services like medical service ameliorative service like creches for children, canteen for workers, cannot be apportinoned on acreage basis. Method of computation by the Agricultural Income-tax Officer had adopted a narrow and parochial approach, from an erroneous belief that the petitioner has made a deliberate manipulation of his accounts to show loss from the Madras State portion of the estate, whereas the total income from all the estates of Kerala had revealed a profit. This is a wholly arbitrary and unjustifiable approach to the assessment by the taxing authority and cannot be justified from any point of view. In this connection, I may advert to one other argument of Mr. V. K. Thiruvenkatachari, learned Counsel for the petitioner. He contended that computation made by the Agricultural Income-tax Officer involves the assumption that the tea produced or manufactured in the Kerala area as well as in the Madras area in the Chittavurrai Estate was of the same quality and was sold for the same price. He contends there is no basis for such assumption and that there may be difference in quality in the tea produced in the Madras area and the same may have been sold at different times for different prices. He contends that under those circumstances, to separate the value of the tea produced in the Madras area would not be a correct method of computation. But there are no data to decide how far this argument can be upheld.

The Appellate Tribunal recognised the impropriety of the assessment. But, we cannot accept the rectifications that the Tribunal had directed to be carried out after remand. It gave a few instances of items of expenditure, which have to be apportioned on acreage basis and a few items of expenditure, which have to be apportioned on the basis of yield, and then directed the Appellate Assistant Commissioner to review the remaining items of expenditure and find out whether they are suitable for being apportioned under one or other basis, *viz.*, acerage or yield. But here again we wish to point out that the company has treated the whole estate as a unit from the business point of income and the assessing authorities have no basis to attack this. Accounts are kept for the estate as a whole. A factory is maintained for the whole estate. The labour and other services are common. The managerial staff is common. If in a particular year a part of the estate or a pocket in it has remained uncultivated for some reason or other, or has given poor yield, and other parts of the estate had given good yield, it cannot be assumed that the items of expenditure incurred by the company as a whole for the estate as a unit, should be apportioned over such minor areas or pocket in the estate. Fluctuation in yield over different portions of an estate will be a normal feature and they cannot be utilised for cutting up the expenditure over the better yielding and poorly yielding areas. As long as no valid attack can be levied against the procedure of the company treating the estate as a single unit for business and administration purposes, any attempt to carve out the portions of the estate for apportioning individual items of expenditure over the different portions will only lead to an improper computation of profit or loss. Therefore we are unable to agree with the order of remand by the Appellate Tribunal for re-computation.

There remains the point that the Income-tax Officer has apportioned the net loss for the estate in the Madras State on the basis of yield. We asked the learned Counsel for the petitioner whether this loss re-apportioned on the basis of acreage would give any different result, and he gave a figure of loss which will be about

Rs. 600 less. Here again one cannot seriously challenge the apportionment of final loss on the basis of the value of the produce, as the receipts are on the basis of the yield from the different portions. We, therefore, hold, on an examination of the record and after hearing the arguments of Counsel on both sides, that the agricultural Income-tax Officer has deviated from the method of computation adopted by the petitioner and accepted by the Central Income-tax Officer on totally erroneous grounds. The method of computation which he has adopted in lieu of the Central Income-tax Officer's computation is wholly unfair and cannot be supported from the point of view either of business or of making a proper assessment to tax. Equally unsupportable is the alternative method suggested by the Appellate Tribunal. Therefore, the order of the Tribunal has to be set aside and the Agricultural Income-tax Officer directed to make an assessment on agricultural income adopting the figures arrived at by the Central Income-tax Officer.

The above conclusion will be sufficient for disposing of the present cases. But, learned Counsel Sri Thiruvenkatachari for the petitioner urges that apart from the circumstances of this case, on a question of legal interpretation of the Agricultural Income-tax Act, the computation of the Central Income-tax Officer has to be followed automatically by the Agricultural Income-tax Officer as it is statutorily binding on him, and there is no question of substituting for that computation any other computation by the Agricultural Income-tax Officer as has been done in this case. According to the learned Counsel, under Article 366 (1) of the Constitution, "agricultural income" means agricultural income as defined for the purpose of the enactments relating to Indian Income-tax Act. The Agricultural Income-tax Act has adopted the definition of "agricultral income" given in the Indian Income-tax Act. For applying this definition, there is a difficulty in the case of tea, which has little commercial value in its green and uncured condition. Only after curing it becomes a readily marketable commodity, It has been recognised that curing of tea is an industrial, but not an agricultural process. Therefore, in the income realised by the sale of manufactured tea in the market, a portion has to be attributed to the industrial process and the remainder to agricultural process; the levy of Income-tax will fall on the former, while agricultural income-tax will be leviable on the latter portion. For this purpose, rule 24, framed under the rule making power under section 59 of the Income-tax Act, provides that 40 per cent. of the income computed under the Indian Income-tax Act will be assessable to the Central Income-tax. The plain implication will be that the balance of 60 per cent. is agricultural income. The *Explanation* to the definition of "Agricultural income" in section 2 of the Agricultural Income-tax Act states:

"Agricultural income derived from such land by the cultivation of any crop means that portion of the income derived from the cultivation, manufacture and sale of the produce of that crop as is defined to be agricultural income for the purposes of the enactments relating to Indian Income-tax and if it has not been so defined, the whole of the income."

Therefore, the Agricultural Income-tax Act has also given statutory recognition for treating the 60 per cent. of the income, computed under rule 24 of the Indian Income-tax Act in the case of tea, as agricultural income. The Supreme Court in *Karimtharuvi Tea Estates Ltd.* v. *The State of Kerala*[1], while dealing with a case under the Kerala Agricultural Income-tax Act, which contains a provision similar to section 2 of the Madras Agricultural Income-tax Act, with specific reference to tea in the *Explanation*, observed that agricultural income from a tea plantation has to be computed in the same manner as it is comptuted under the provisions of the Indian Income-tax Act. The learned Counsel for the petitioner Sri V.K. Thiruvenkatachari, requested us to construe the words "in the same manner" used by the Supreme Court in the above cited judgment to mean "actually computed by the Central Income-tax Authorities for levy of Income-tax". On the other hand, the contention of the learned Government Pleader for the State is that the requirements of the statute will be complied with by a factual computation in accordance with the provisions of the Indian Income-tax Act, but it is not an obligatory requirement that computation of the Central Income-tax Officer for the levy of In-

1. (1963) 1 I.T.J. 169: (1963) 1 S.C.J. 265.

come-tax should be automatically accepted by the Agricultural Income-tax Authorities. The latter have a discretion to accept the Central Income-tax Officers' computation where it appears reasonable or to depart from it when they think it necessary and make independent computation of their own, after applying Indian Income-tax Act and its Rules. Sri Thiruvenkatachari also pressed us to consider in support of his argument, the provision in Article 261 (1) of the Constitution.

"261 (1). Full faith and credit should be given throughout the territory of India to public acts, records and judicial proceedings of the Union and of every State."

He also referred to the decision of the Supreme Court in *Lalji Haridas* v. *State of Maharashtra*[1], where the view was expressed though in a different context that proceedings before the Income-tax Officer were judicial proceedings for the purpose of section 193, Indian Penal Code, and it must be treated as proceedings in a Court for the purpose of section 195 (1) (*b*) of the Criminal Procedure Code. But it may not be proper to press into service this provision of the Constitution for giving statutory force, to the computation by the Central Income-tax Officer, for the purpose of computing agricultural income on tea. It would give rise to practical difficulties. Thus it may happen sometimes that proceedings for the assessment under the Indian Income-tax Act are prolonged for some reason or other. It will be unreasonable to expect the Agricultural Income-tax Officer to delay the making of the assessment under that Act till the Central Income-tax Officer makes his assessment. Another circumstance pointed out by the learned Government Pleader is that the period of accounting may be different for the agricultural income and for the Central Income, though, this will rarely happen. The learned Government Pleader referred to the decision of the Kerala High Court in *Commissioner of Agricultural Income-tax* v. *Perunad Plantations Ltd.*[2], where that High Court observed that the Agricultural Income-tax Officer is not bound to accept the computation of income from tea made by the Central Income-tax Officer. Another difficulty will be where the Central Income-tax Officer has made a consolidated assessment for income in respect of properties of an assessee which are situated in two adjacent States as in this case, but where he has not indicated in his assessment order the way in which the income from the property in the different areas has to be apportioned. No doubt, in the present case the Central Income-tax Officer has indicated the apportionment of the income over the different areas, but it may happen that in a particular case, the territorial jurisdiction of the Central Income-tax Officer may include both the areas, and he may not have felt it necessary to make the apportionment. In those cases, it will be necessary for the Agricultural Income-tax Officer to make an apportionment. Therefore it may not be proper to lay down as a rule of law that for the computation of agricultural income in the case of tea, where both agricultural as well as industrial processes are involved, the computation made by the Central Income-tax Officer shall be the computation which the Agricultural Income-tax Officer has to adopt. But at the same time weighty reasons can be urged in favour of the view that the Agricultural Income-tax Officer should, as a rule, adopt the Central Income-tax Officer's computation, particularly in cases where the Central Income-tax Officer's computation is complete, and is available to the Agricultural Income-tax Officer. As between officers of two different Government Departments engaged in making assessments, one of the Centre and the other of the State, if each were to consider the other officer's computation to be wrong and proceeds to make an independent but conflicting calculation under the provisions of the Indian Income-tax Act, not merely will the assessees suffer, but there will be risk and anomaly of the Central Department assessing what is really agricultural income liable to assessment by the State, and the State Department assessing what is really income for the purpose of income-tax liable to assessment by the Central Government, each one encroaching upon the jurisdiction of the other. Such conflicts have to be avoided, in the interests of the assessees as well as of the Governments concerned. The data available to the Central Income-tax Department, will be generally fuller, because they have been engaged in making assessments to Central Income-tax from a period long

1. (1964) 1 I.T.J. 539: (1964) 1 S.C.J. 541: (1964) M.L.J. (Crl.) 315.
2. (1964) 2 I.T.J. 405.

anterior to the Agricultural Income-tax Act which has been enacted only on 1955. Their staff are well trained in applying the various provisions of the Income-tax Act to make assessments on business income, where the agricultural Income-tax Officers ordinarily deal with the computation of purely agricultural income.

Our attention was drawn to certain Rules framed by the Madras Government under their rule-making power for resolving such a conflict and to ensure the making of proper assessments. Rule 7 (1), which reads :

"In respect of agricultural income from tea grown and manufactured by the seller in the State of Madras, the portion of the Income worked out under the Indian Income-tax Act and *left unassessed* as being agricultural *shall be assessed* under the Act after allowing such deductions under the Act and the Rules made thereunder :

Provided that the computation made by the Indian Income-tax Officer, shall ordinarily be accepted by the Agricultural Income-tax Officer who may, for his satisfaction under sections 16 and 17 of the Act obtain further details from the assessee or from the Indian Income-tax Officer but shall not without the previous sanction of the Assistant Commissioner of Agricultural Income-tax require under section 39, the production of account books already examined by the Indian Income-tax Officer for determining the Agricultural income from tea grown and manufactured in the State of Madras or refuse to accept the computation of the Indian Income-tax Officer.

Provided further that if the income for the purpose of the Indian Income-tax Act has not been determined before the filing of returns under section 16, the assessee shall submit along with the returns a statement of profit and loss in respect of his entire income derived partly from agriculture and partly from business and thereupon he shall be assessed treating his agricultural income to be 60 per cent. and of the income derived from tea grown and manufactured in the State of Madras after allowing the deductions allowed by this Act, this assessment being subject to revision after the income for the year has been determined for the purpose of the Indian Income-tax Act, 1922 (Central Act XI of 1922).

The words (italicised by us) "shall be assessed" in the main portion of the rule imply that the Central Income-tax Officer's computation will be binding on the Agricultural Income-tax Officer. The second proviso to the rule providing for a revision of assessment to conform to the Central Income-tax Officer's computation when it is subsequent to the Agricultural Income-tax Officer's assessment, also leads to the same conclusion.

There is, however, one comment to be made regarding the first proviso to rule 7. It requires the Agricultural Income-tax Officer to get the prior permission of his superior officer, if he proposes to reject the computation of the Central Income-tax Officer and make a fresh computation. Thus, he will be surrendering his judgment to that of a superior officer and take the latter's orders in the matter of deciding whether he should accept or not accept the Central Income-tax Officer's computation. However, rule 7 applied to agricultural income from tea grown and manufactured in the State of Madras—in the present case, the tea is grown inside the State but manufactured outside the State of Madras—and—Rule 7 is inapplicable. We do not therefore propose to examine in this case how far the first proviso to rule 7 is a valid one.

According to the learned Government Pleader, rule 8 of the Rules will apply to the present case. This was also the view of the Assistant Commissioner of Agricultural Income-tax. That rule reads :

"Where an agricultural income is derived from lands situated partly within the State and partly without the State and the income attributable to the land situated within the State cannot be determined by the assessee but where the value of the produce grown within or without the State can be separately determined from the accounts maintained by the assessee, such income shall be computed in proportion to the value of the respective quantity of produce raised within or without the State. In other cases such income shall be computed in proportion to the respective cultivated acreage of the crop lying within and without the State if the crop grown is the same, subject to such modifications as may be necessary with reference to the yield per acre, the quality of the produce and the price fetched within and without the State."

This rule refers to a case of agricultural income derived from lands situated partly in one State and party in another. In the first place, this rule may not be applicable to tea, where the agricultural income has to be determined not from the value of the produce alone, but from the value of the produce sold after it has been subjected to an industrial process which will make a material difference in the computation of income. Secondly, the assessing authority has not strictly applied rule 8 in this case. He has not apportioned the net income in proportion

to the value of the produce, as required in the first part of the rule. The second part of the rule requires the proportion of the net income to be calculated on the basis of the area, but the Agricultural Income-tax Officer in this case has calculated only the expenditure in the proportion of the area and deducted it from the gross income calculated on the basis of value of the produce.

The foregoing discussion would show that the most salutary and proper procedure will be for the Agricultural Income-tax Officer to adopt the Central Income-tax Officer's computation and assess the income for the purpose of Agricultural Income-tax what has been left unassessed by the Central Income-tax Authorities in the case of tea. In the present case, the Agricultural Income-tax Officer has refused to accept the Central Income-tax Officer's computation for totally unsatisfactory and unjustifiable reasons, and therefore, we have to set aside the order of assessment so that the assessment might be made on the basis of the Central Income-tax assessment on the facts of this case. Though the learned Government Pleader referred to the Rules framed under the Agricultural Income-tax Act, in our opinion, they have no application to the facts of this case. Learned Counsel for the assessee urged that we should give a decision in that case that the Central Income-tax Officer's computation should be deemed to be statutorily binding on the Agricultural Income-tax Officer. But equally, vehemently, the learned Government Pleader urged us to follow the Kerala High Court's decision referred to above in *Commissioner of Agricultural Income-tax* v. *Perunad Plantations Ltd.*[1] and hold that the Agricultural Income-tax Officer is not bound by the Central Income-tax Officer's computation in the case of tea. But, on the facts of the case, which we have discussed at length the Agricultural Income-tax Officer has not given sufficient reasons for not accepting the Central Income-tax Officer's computation, which must be deemed to be a proper one and which should have been adopted in this case. In view of this, it is unnecessary for us to give a finding on the abstract question whether the Central Income-tax Officer's computations should be legally binding on the Agricultural Income-tax Officer.

We allow the Revision Case (T. C. No. 146 of 1963) for the reasons aforesaid, and set aside the order of the authorities below. We also make the rule *nisi* in each of three Writ Petitions (W.P. Nos. 698 to 700 of 1963) absolute. The result is that the assessments concerned in these Writ Petitions, are not susceptible to the revision as now proposed by the Agricultural Income-tax Officer. The Agricultural Income-tax Officer will be directed to make a revised assessment in the case of T.C. No. 146/63 in the light of our observations above, on the basis of the Central Income-tax Officer's computation, which, in the circumstances of the case, has to be accepted as the proper basis for the assessment of agricultural income-tax. No order as to costs.

V.S. *Ordered accordingly.*

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1. (1964) 2 I.T.J. 405 : (1964) K.L.T. 581.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Jurisdiction).

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

(*In the matter of* The Prabhakar Glass Works, Ltd. in Liquidation).

The Prabakar Glass Works Ltd. (in voluntary liquidation) by its voluntary liquidator .. *Petitioner**

v.

The Official Liquidator, Madras High Court, the Official Liquidator of the Company abovenamed .. *Applicant.*

Companies Act, (*I of* 1956), *sections* 426, 473 *and* 483—*Company—Winding up—Liability of past members—Funds by sale of assets, sufficient to meet the claim of creditors and for costs—Orders of Company Court obtained for recovering unpaid share money from past members—Existence of sufficient funds, not brought to the notice of Court—Orders obtained for payment of a percentage to preference shareholders also—Orders of Court becoming final—Balance of funds in the hands of the Official Liquidator—Order returning to past members in proportion to the payment made by them.*

In the winding up of the company a call to the past members for the payment of the unpaid share capital was made and a sum of Rs. 9,005.84 was also realized from them without the attention of the Court being drawn to the fact that even on that date the amount realised from the sale of the assets was in excess of the amount due to the creditors. Subsequently an order was also obtained from the Company Court for returning seventy per cent. of the share capital to the preference shareholders and it was so paid. At this stage the Official Liquidator, having in his hands a sum of Rs. 3,431.93 only, sought directions from the Company Court on the points, whether he can retain the proceeds of the calls already made and collected, whether he can call the further unpaid amounts, or whether the amounts received from the past members should be returned and for this purpose to recover from the preference shareholders a fraction of the payment already made to them,

Held, there was no justification to call for contribution from the past members since the other assets of the company were sufficient to pay all the debts and costs and there was even a surplus. But the call had been made and the order had become final by virtue of sections 473 and 483 of the Companies Act of 1956. Having regard to the finality of the order passed in regard to the payment to the preference shareholders it is not possible to order the preference shareholders to repay any portion of the capital which they had received. A just and equitable order to pass would be to return the balance in the hands of the Official Liquidator in proportion to the fraction borne by the individual contribution of the past member to the total contribution made by all the past members.

Application by the Official Liquidator for certain directions.

Official Liquidator (*K. Vaideeswaran*) (Applicant) in person.

M. S. Venkatarama Iyer, Advocate for *P. Kuppuswamy Ayyar* (a preference shareholder).

The Court delivered the following

ORDER.—To answer the questions raised by the Official Liquidator in this application it is necessary to state the facts in some detail. The company in question the Prabhakar Glass Works Ltd. was initially voluntarily wound up and then the winding-up is being continued under order of Court. When the voluntary liquidation commenced, a sum of Rs. 22,800 remained due as unpaid share capital. The voluntary liquidator settled a list of contributories of the persons from whom the money was thus due. He realised Rs. 4,600 and later another sum of Rs. 1,000 and there remained a balance of Rs. 17,200. The shares in respect of which the calls were thus unpaid had been forfeited by the Company by a resolution dated 6th September, 1955, of the Board of Directors. But since the forfeiture was within a period of one year prior to the commencement of the winding-up, namely, 12th March, 1956, the members whose shares had been forfeited were included in the list of contributories as past members of the Company liable under section 426 of the Companies Act, 1956. The then Official Liquidator Sri Arunachalam took out Application No. 1197 of 1959 for leave to make a call on these past members. Permission was given to make a call of this sum of Rs. 17,200. A sum of Rs. 3,405.84 was collected by the Official Liquidator and the balance remained unpaid. In this application put in by the present Official Liquidator Sri Vaideeswaran, it is seen that the amount realised from the sale of the assets was in excess of the amount

* C.A. No. 268 of 1964 9th April, 1965.
P. No. 234 of 1957.

due to the creditors, namely, Rs. 37,713 even when the previous Official Liquidator took out the application for calls on the past members. The present Official Liquidator thinks that when the existing assets were thus sufficient to discharge the creditors the liability of the past members did not arise and he quotes some decisions which will be referred to later. If that view is right, the amount collected from the past members would have to be refunded to them. This amount would be Rs. 4,600 plus Rs. 1,000 plus Rs. 3,405.84, namely, Rs. 9,005.84. But the Official Liquidator has only about Rs. 3,431.93 remaining with him out of the general assets. In other words, the amount on hand is not sufficient to refund the sum of Rs. 9,005-84. The extra sum required for making the refund to the past members can be collected only by recovering back from the preference shareholders a portion of the share capital which was refunded to them by order of this Court dated 25th September, 1959, in Company Application No. 1199 of 1959 taken out by the previous Official Liquidator. In that application 70 per cent. of the share capital was ordered to be returned to the preference shareholders. The two Applications Nos. 1197 and 1199 of 1959 were put in at the same time but the then Official Liquidator did not bring it to the notice of the Court in Application No. 1197 of 1959 that the amount realised by the sale of the assets was more than sufficient to pay the creditors and even to leave a surplus for return of the substantial part of the share capital to the preference shareholders. The past members also did not bring that fact to the notice of the Court. The result was that on 4th September, 1959, the Court passed an order in Application No. 1197 of 1959 directing a call to be made from the past members to the tune of Rs. 17,200 and on 25th September, 1959, passed an order in Application No. 1199 of 1959 directing the return of 70 per cent. of the share capital to the preference shareholders.

The Official Liquidator states in the present application that if it is held by the Court that a sum of Rs. 9,005.84 should be refunded to the past members, a sum of Rs. 7 per share may have to be recovered back from the preference shareholders taking into consideration the probability of some of the preference shareholders not paying. He draws the attention of the Court to the fact that the orders of this Court dated 4th September, 1959, in Application No. 1197 of 1959 and 25th September, 1959 in Application No. 1199 of 1959 have become final, not having been appealed against, though an appeal is provided for under section 473. On the footing that the prior orders of this Court are there and will have to be enforced, the Official Liquidator asks for directions (i-a) whether he could retain the proceeds of the calls already made on past members even though it had been wrongly collected from them; (i-b) whether he could get a balance order against the contributories who have still to contribute under the orders of Court dated 4th September, 1959 ; (ii) alternatively, if the Court holds that notwithstanding the prior orders of this Court it was wrong to have made any call on the past members, whether the amount of Rs. 9,005.84 so collected from them should be refunded to them, and (iii) whether steps may be taken by the Official Liquidator to recover Rs. 7 per share from the preference shareholders. There is the incidental prayer for the costs of this application to come out of the estate.

Notice of this application was given to the past members and to the preference shareholders but only one person has appeared and that is Sri P. Kuppuswami Ayyar, a preference shareholder, who holds five preference shares for Rs. 500. He states that no work was done by the company and no dividend was paid at all and that by virtue of the order dated 25th September, 1959, in Application No. 1199 of 1959 he got 70 per cent. of the share capital, namely, Rs. 350 and that by virtue of sections 473 and 483 of the Indian Companies Act the orders dated 4th September, 1959 and 25th September, 1959, have become final and that the Court cannot ask the preference shareholders to return any portion of the amount already paid to them. He goes to the extent of saying that it will be just to direct the amounts now available with the Official Liquidator to be given to the preference shareholders instead of being refunded to the past members.

The following are the substantive provisions of the Act dealing with the liability of the past member. Section 426 in so far as it is relevant says:

"(1) In the event of a company being wound up every present and past member shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities and the costs, charges and expenses of the winding up, and for the adjustment of the rights of the contributories among themselves, subject to the provisions of section 427 and subject also to the following qualifications, namely :—

(a) a past member shall not be liable to contribute if he has ceased to be a member for one year or upwards before the commencement of the winding up;

(b) a past member shall not be liable to contribute in respect of any debt or liability of the company contracted after he ceased to be a member;

(c) no past member shall be liable to contribute unless it appears to the Court that the present members are unable to satisfy the contributions required to be made by them in pursuance of this Act;

(d) in the case of a company limited by shares, no contribution shall be required from any past or present member exceeding the amount, if any, unpaid on the shares in respect of which he is liable as such member;

Section 470 :

"(1) The Court may, at any time after making a winding up order, and either before or after it has ascertained the sufficiency of the assets of the company :—

(a) make calls on all or any of the contributories for the time being on the list of the contributories, to the extent of their liability, for payment of any money which the Court considers necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding up, and for the adjustment of the rights of the contributories among themselves;

(b) make an order for payment of any calls so made;

(2) in making a call, the Court may take into consideration the probability that some of the contributories may, partly or wholly, fail to pay the call."

Section 475 :

"The Court shall adjust the rights of the contributories among themselves, and distribute any surplus among the persons entitled thereto."

On the procedural aspect on the finality of the orders of this Court section 473 says :

"(1) An order made by the Court on a contributory shall, subject to any right of appeal, be conclusive evidence that the money, if any, thereby appearing to be due or ordered to be paid is due,"

Section 483 provides for the right of appeal on the original side of this Court.

Now, confining ourselves to the substantive provisions it seems to me that the prior order dated 4th September, 1959 in Application No. 1197 of 1959 and the consequential order in Application No. 1199 of 1959, dated 25th September, 1959 may not be correct. That is because under the provisions of the Act and the decisions on the point, the liability of the past member would arise only if the existing assets plus the contribution of the present members for the unpaid call are not sufficient, to pay the debts of the company and costs. In the present case it appears from the report of the Official Liquidator that the present members had paid the share capital in full but then the existing assets were sufficient to meet all the debts of the company and the costs. It will be seen from section 426 (1) that the past member is liable to contribute to the assets of the company an amount sufficient for payment of its debts and liabilities and costs, charges and expenses of winding up. This means that if the assets themselves are sufficient for the payment of the debts and liabilities and costs, charges and expenses of winding up, there is no need to contribute.

In *Brett's case and Morris case*[1], which were reheard by the Court of Appeal Lord Selborne, L. C., states at page 808 :

"Reason, justice and equity appear to me to require, that, as to all the matters for which, under section 38, a liability is cast upon past members, the liability of all the present members should be first exhausted, or (which is the same thing) ascertained to be insufficient."

At page 811 he states :

1. (1873) 8 Ch. App. 800.

"... all the property in hand at the date of the winding-up, and the contributions of all the present members, were primarily and justly liable to pay all the debts of the company rateably and equally, as far as they would extend before any liability of past members could arise.........."

meaning thereby that the liability of the past members would arise only after the existing assets and the contributions of the present members is found to be insufficient to meet the debts and liabilities. He reiterates the same idea in the following form lower down :

"... the liability of past members to contribute in respect of debts contracted before they ceased to be members could not exceed the amount of the residuum of those debts, to use Lord Westbury's expression, after writing off from them the full amount of dividends paid *out of the property in hand and the contributions of present members.*" (Italics is mine for the purpose of this case).

It is unnecessary to discuss the actual facts in *Brett's case.*[1]

In In re *City of London Insurance Company Ltd.*[2], the capital was £500,000 in shares of £1 each. On the date of the winding up 1,601 shares were fully paid-up. The remaining 4,98,399 shares were paid-up only to the extent of 6 s. per share. The winding-up commenced on 3rd February, 1922. On 18th July, 1921, the holders (2,170 in number), of 4,63,801 shares paid-up to the extent of 6s. per share had transferred them to the City Equitable Associated Ltd., who remained the registered holders thereof at the date of the liquidation. The City Equitable Associated Ltd., became insolvent and no more than a penny in the pound could be realised by calls on them though they were placed on the *A* list—*Present members*. Hence calls were made on the transferors of the shares putting them in the *B* list. At the stage on which the matter came up before Eve, J., it became clear that the amount already collected from the contributories would substantially exceed the difference between the aggregate of the liabilities in respect of which they were liable to contribute and the amount available to satisfy such liabilities out of the general assets of the company other than the proceeds of the two calls made on the *B* contributories and the question was whether this excess estimated to amount of £10,000 upwards should be refunded to the *B* contributories or be treated as part of the general assets. To put it in a simpler language, after taking into account the amount realised by the sale of the assets of the company and the contributions of the present members it was necessary to make a call on the *B* contributories only to a certain extent, but calls had been made substantially in excess of that amount and the excess was £10,000 upwards and the question was whether that amount had to be refunded to them or treated as part of the general assets of the Company. Eve, J., answered the question thus :

"I think it is clear that the moneys, subject to any deduction for costs properly chargeable to the *B* contributories, must be refunded to them. Their liability to contribute is created by statute, and is restricted to so much of the amount left unpaid on their shares by their associated *A* contributories as does not exceed the balance of the debts and liabilities of the Company, contracted before they respectively ceased to be members, which remains unpaid after the assets of the company and the contributions of the *A* contributories have been applied *pari passu* towards the payment of all the debts of the company whenever contracted. In the present case the proceeds of the calls made on the *B* contributories exceed that balance, and any dealing with the excess otherwise than by returning it to the *B* contributories would operate to impose on them an increase of liability for which there is no statutory justification."

It will be seen that Eve, J., says that first the assets of the company and the contributions of the *A* contributories, that is, the present members, would be applied and call made on the past members only to the extent of the deficiency required to pay the debts which existed before the past members ceased to be members.

It seems to me to follow from the above discussion that since the other assets of the company were sufficient to pay all the debts and costs and there was even a surplus, there was no justification to call for contribution from the past members but the call has been made and the order has become final by virtue of section 473 and section 483. The only question is what is the proper and just order to be passed in the situation which exists at present. Having regard to the finality of the orders already passed, it is not possible to order the preference shareholders to repay any portion of the capital which they have received by virtue of the order dated 25th September,

1. (1873) L.R. 8 Ch. App. 800.
2. (1932) L.R. 1 Ch. D. 226.

1959. At the same time it is not necessary to enforce the order of 4th September, 1959, further by passing the balance order against the past members who have not paid in full or in part the amount directed by this Court on 4th September, 1959. Further it would be just and equitable in view of the principles outlined above to refund the sum of Rs. 3,431-93 (cash on hand) after retaining a small portion for incidental expenses, to the past members. Justice requires that this be done *pro rata* of the amounts actually paid by the past members. Thus keeping a sum of Rs. 131-93 for costs and expenses, if we distribute the balance of Rs. 3,300 to the past members, the past members who paid sums amounting to Rs. 4,600 will get 4,600/9,005.84 out of Rs. 3,300. The past members who paid Rs. 1,000 will get 1,000/9,005.84+3,300. The person from whom an amount of Rs. 3,405.84 has been collected will get 3,405.94/9,005.84. It seems to me that this is the only order which can justly be passed in accordance with law and justice. Costs of this application will come out of the estate.

V.S. ——— *Ordered accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI.

T. V. Ramaswami Chettiar .. *Petitioner**

v.

The Regional Transport Officer, Nilgiris and others .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 33 (1)—Suspension of certificate of registration—Procedure to be adopted.

The principal elements of sub-section (1) of section 33 of the Motor Vehicles Act are (*a*) the Registering Authority should not merely believe on mere fanciful or capricious grounds, but should have reason to believe that any motor vehicle has been used illicitly for hire, (*b*) the authority should give its reasons in writing for suspending the certificate and (*c*) before the Authority comes to a conclusion it should give the owner of the vehicle an opportunity to make his representation, if any. It is needless to say that the opportunity so given should be effective. In order to be an effective opportunity to the party he should be given a copy of the check report or informed of the materials on which the Registerng Authority has formed its belief.

Where the suspension order relied on the check report of the Police, without furnishing a copy of the same to the owner of the vehicle, it is a denial of the opportunity required by the section and the order is liable to be quashed. Forwarding a copy of the check report or other relevant material leading to the suspension of the certificate is not a mere formality but is a substantial requirement to be complied with under the sub-section before a owner is charged with using his vehicle for any illicit purpose.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records connected with the order of the Regional Transport Officer, the Nilgiris, dated 13th September, 1962, and made in R. No. 15568/A7/62, as confirmed by the order of the Regional Transport Authority, the Nilgiris, dated 10th November, 1962, and made in K. Dis. No. 4898/M/62 and quash the said orders therein.

S. Palaniswami, for Petitioner.

K. Venkataswami, for Additional Government Pleader (*V. Ramaswami*) for Respondents.

The Court made the following

ORDER :—The petitioner's registration certificate for his car MDN 4820, was suspended for a period by the Registering Authority, the Appellate Authority agreeing with it, on a charge that he plied the car illicitly as a taxi in violation of section 33 (1) (*b*) of the Motor Vehicles Act. The petitioner seeks to quash the suspension of the certificate on the ground that a copy of the check report of the Police Officer, which led to framing of the charge and suspension of the certificate was not furnished to him at any stage.

* W.P. No. 1324 of 1962. 26th February, 1964.

Section 33 (1) states that if any Registering Authority has reason to believe that any motor vehicle within its jurisdiction has been used for hire, such Authority may, after giving the owner an opportunity of making any representation he may wish to make, for reasons to be recorded in writing, suspend the certificate of registration of the vehicle for a period not exceeding four months. The principal elements of this sub-section are :—(i) the Registering Authority should not merely believe but should have reason to believe, (ii) should give its reasons in writing for suspending the certificate and (iii) before the Authority comes to a conclusion it should have given the owner of the vehicle an opportunity of making representations which he may wish to make. The first ingredient will imply that the belief which the Registering Authority may form should not be on fanciful or capricious grounds and this means it must have some material which would provide the reason for the belief. It is but proper to suppose further from this ingredient that the material which formed the basis of the reason for the belief may be used against the owner of the car. It is with reference to this requisite that an opportunity should be given to the owner to make representations should be understood. Such an opportunity must be an effective one and in order that it may be effective, it is necessary that the owner must be given a copy of the check report or he must be told in some form the material on which the Registering Authority has formed its belief, so that he may have the opportunity of countering it, if he can. The requisite of giving an opportunity is not merely a formal thing, but it is a matter of substance, more especially when an elaborate enquiry, notwithstanding the fact that the charge will be of a criminal nature, is not contemplated by the statutory provision. It is, in order to give effect to the first two elements of the sub-section, is provided the requirement that the Registering Authority should give reasons in writing for suspending the certificate of registration.

In this case, the Registering Authority merely referred to the explanation of the petitioner denying the use of the car as a taxi and declined to accept it on the ground that the check report of the Sub-Inspector gave clear details. The Collector, the Appellate Authority, also referred to the check report as containing details furnishing the reason why the petitioner's explanation should not be accepted. It is, therefore, obvious that both the Authorities below relied on the check report, without furnishing a copy therefor to the petitioner. That clearly is a denial to the petitioner of the opportunity required by the law, to make its representation.

The learned Additional Government Pleader argues that the charge-sheet served on the petitioner practically contained all the information that was to be found in the check report and, therefore, the failure to furnish a copy of the check report did not cause perceptible prejudice to the petitioner. As I said, furnishing a copy of the check report is not merely a formal requirement, but it is part of the opportunity which the law requires should be given to the owner of a car when charged with using it for an illicit purpose. Further, the check report contained the specific names of the passengers found in the car at the time of check. The petitioner had no information about the names of those passengers. What his defence or explanation would have been had he been furnished with a copy of the check report containing those particulars, one need not speculate. It is sufficient to say that failure to furnish a copy of the check report containing such information is contrary to the procedure prescribed by section 33 (1).

On that view, the order of suspension is quashed. The petition is allowed. No costs.

R.M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

Messrs. P. Puthoorvana Rawther, Dindigal .. *Petitioner**

v.

State of Madras represented by the Additional Commercial Tax Officer (Assessment), Madurai .. *Respondent.*

Madras General Sales Tax Act (I of 1959)—First Schedule—Item 59 before and after amendment on 1st October, 1960—Myrobalan—If tanning material—Test to decide under which category a particular material will fall where it is capable of more than one use.

Interpretation of Statutes—Looking into later enactment for clarifying the provisions of an earlier enactment—When permissible.

Item 59 of the 1st Schedule to the Madras General Sales Tax Act (1959) before its amendment on 1st October, 1960, covered all dyeing and tanning materials. Myrobalan is largely used for tanning even though it is also used in small quantities in manufacture of medicines and ink. Where an article sold is capable of being used for more than one purpose (*e.g.,*) as chemical and as colour, the answer to the question as to what was sold will depend on how it was treated by the vendor. Where myrobalan was sold in large quantities and one of its chief uses is as tanning material, and the seller and buyer treated it as such then the sale will fall under the entry ' tanning material ' even though the material sold might be capable of being used in manufacture of medicines or ink.

The principle of using a later enactment for clarifying the terms in an earlier enactment, as a guide in the interpretation of statutes, is a very restricted one and can be resorted to only where the earlier Act is ambiguous or is susceptible of two meanings.

Petition under section 38 of the Madras General Sales Tax Act, 1959 praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 31st December, 1962 and made in T.A. No. 100 of 1962 preferred against the order of the Appellate Assistant Commissioner of Commercial Taxes, Madurai, dated 23rd December, 1961, and made in Appeal No. 412/61-62 preferred against the order of the Additional Commercial Tax Officer (Assessment), Madurai, dated 31st October, 1961 and made in Assessment No. 626/59-60.

K. Narayanaswamy and *V. Rajagopalan*, for Petitioner.

G. Ramanujan, for the Government Pleader on behalf of Respondent.

The Order of the Court was pronounced by

Ramakrishnan, J.—The petitioner before us is a dealer in raw hides and skins, tanning barks, myrobalan and other articles in Dindigul. During 1959-60, he showed a turnover of Rs. 2,45,878 and odd relating to myrobalan. The sales fell before 1st October, 1960. During the period prior to that date, which includes the period of assessment, the provision for single point levy in Item 59 of the First Schedule of Madras Act I of 1959, read thus :

" Wattle bark including dyeing and tanning materials—At the point of last purchase in the State—3 per cent."

After 1st October, 1960, this item was amended as :

" Wattle bark ' avaram bark ' konnam bark, wattle extract, quobracho, and chestnut extract—At the point of last purchase in the State—1 per cent "

It is common ground that the assessee sold the above quantity of myrobalan to tanners in the State. The view of the Department was that since myrobalan could also be used for medicinal purposes and also for making of ink, it could not come under the aforesaid description for single point levy, as it was before 1st October, 1960. The Tribunal, to whom the assessee appealed, was also of the same view. It also said that the subsequent amendment of Item 59 of the First Schedule could be utilised to interpret the earlier provision, and, so interpreted, myrobalan would not be a tanning material. Therefore, the prayer of the assessee for excluding it from his assessable turnover was rejected. He has come before us in Revision.

* T.C.No. 148 of 1963 (Rev. No. 100.) 4th August, 1964.

A reference to the Shorter Oxford Dictionary shows that myrobalan is described as a substance used formerly in medicines, but is now used chiefly in tanning, dyeing and ink making. Learned Counsel for the assessee has also produced a copy of a book issued by the Central Leather Research Institute, Madras, in 1959 as the Report of a Symposium on Tanning as a Small Scale and Cottage Industry. At page 78 of this book there is a remark that although quite a number of tanning materials are available in India, the most suitable for the tanning of sheepskin pelts are avaram bark, babul bark and myrobalan. The process by which myrobalan could be used effectively for tanning is summarised in page 95 of the above book.

Our attention was drawn to the decision of the Allahabad High Court in *Bishambar Dayal Shrinivas* v. *Commissioner of Sales Tax*[1], where the question arose as to in which of two different categories in the Schedule to the U. P. Sales Tax Act, namely (1) dyes and colours and the compositions thereof, (2) chemicals of all kinds, the commodity sold by the assessee, namely, zinc oxide and red lead would fall. The view of the Allahabad High Court was that if an article was capable of being used as a chemical and also as a colour, the answer to the question what he sold, would depend upon how it was treated by the vendor. If he stocked and sold it as a chemical, it would be a chemical sold by him and more so if it was bought by the vendee also as such. In the present case, there is no doubt that tanning, is one of the chief uses of myrobalan and that the seller as well as the buyer treated it as such. Seeing that nearly 2 lakhs worth of stuff were sold in one year, it could not certainly be for medicinal purposes because it is well known that it is used only in small quantities in the preparation of Ayurvedic medicine ; nor is it suggested that any of the buyers in this case are manufacturers of ink—an alternative use for myrobalan. The buyers are admittedly tanners.

Secondly, the principle of using a later enactment for clarifying the terms in an earlier enactment adverted to by the Tribunal was considered in a decision of the Andhra High Court reported in *Narasimha Reddy* v. *State of Andhra Pradesh*[2]. The Andhra High Court quoted a decision of the English High Court in *Cape Brandy Syndicate* v. *Inland Revenue Commissioner*[3]. A clear restriction in regard to the use of this principle as a principle of construction was recognised in that decision, *viz.*, that it can be used only where the earlier Act is ambiguous or if it is susceptible of two meanings. But in the present case, the earlier description in Item 59 took into its compass not merely wattle bark but all dyeing and tanning materials. There may be many commodities which can be used for more than one purpose. When a commodity is described in the Schedule with reference to the purpose for which it is used, the proper way of interpretation would be to consider first whether that purpose is one of its chief uses, and, secondly, whether the principle laid down by the Allahabad High Court of the intention between the buyer and seller in regard to its use can be taken into account for deciding whether it will fall into one particular category or not. The interpretation which the Department seeks to place upon the word is that the commodity should be susceptible of use exclusively for tanning. But, in view of the general way in which the description was given, namely, " dyeing and tanning materials," in Item 59 before its amendment, we cannot read into it the meaning that only commodities used exclusively for dyeing and tanning, were included in that description. The Legislature, after the amendment on 1st October, 1960, has restricted the term to certain specified commodities used exclusively for dyeing and tanning. But it cannot be held by retrospective operation of the amendment that such an intention was implicit in the earlier enactment, especially when the terms of earlier enactment, can be interpreted without any ambiguity, in the light of the principles stated above. We are therefore of the opinion that this is a case where the sales of myrobalan bark to tanners should be assessed at single point as tanning material.

We, therefore, allow the Revision Case and set aside the assessment on the disputed turnover. There will be no order as to costs.

R.M. ——— *Revision allowed.*

1. 14 S.T.C. 184.
2. (1962) 2 An.W.R. 261.
3. L.R. (1921) 2 K.B. 414.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Appellate Jurisdiction)

PRESENT :—S. RAMACHANDRA IYER, *Chief Justice*, AND MR. JUSTICE K. SRINIVASAN.

The Commercial Tax Officer, Salem and others .. *Appellants* *

v.

Mettur Chemical and Industrial Corporation, through its Secretary Sri R. Natarajan at Mettur Dam, R. S. Salem District and another. .. *Respondents.*

Madras General Sales Tax Act (I of 1959), *section* 3 (3)—*Proviso and Rule* 22 *and Form XVII—Concessional rate of tax—Assessing Authority if could decide validity of claim on the application for supply of forms and refuse to supply the necessary forms to enable the assessee to submit the return and claim concessional rate.*

Section 3 (3) of the Madras General Sales Tax Act, 1959, is in general terms and provides for a single point tax and a concessional rate in certain cases in respect of over sixty items set out in Schedule I to the Act. One or more of the goods may be capable of being used in the manufacture of other goods mentioned in the same Schedule. Before such goods are manufactured the assessee has to purchase the goods that would form the raw material for the manufactured goods. It is at this stage that the assessee has to furnish a certificate in Form XVII to the dealer from whom he purchases such raw material and it is to enable him to make the purchase that this certificate has to be prepared and handed over to the selling dealer.

Whether or not the concessional rate of tax would be available in respect of the sale of that raw material would be a matter to be considered at the time of the assessment of the selling dealer. The mere issue of a blank declaration form to be used by the assessee and which form is to be supplied by the Department, does not decide the question and the departmental officials will not be justified in deciding the validity of the possible future claim of the assessee for the concessional rate of tax, even a the stage of the supply of the blank form and refuse to supply the same.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Veeraswami dated 17th April, 1963, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 445 of 1961 presented under Article 226 of the Constitution of India to issue a writ of *mandamus* calling for the records in the 1st Respondents L. Dis. B-1 1711/61 dated 4th March, 1961, and confirmed in the 2nd respondents L. Dis. No. 1901 of 1961 dated 17th March, 1961, and direct the 1st respondent to issue to the Petitioner a book of blank declaration forms prescribed under Madras Act I of 1959 in Form XVII.

The Additional Government Pleader, for Appellant.

K. Rajah Iyer, K. Harikaran and *K. Srinivasan*, for Respondents.

The Order of Court was pronounced by

Srinivasan, J.—The State is the appellant. The appeals are against the judgment of Veeraswami, J., by which he directed writs of *mandamus* to issue against the Commercial Tax Officer and the Deputy Commissioner for Commercial Taxes in the following circumstances. The two petitioners before the learned Judge, the respondents here, are manufacturers of *vanaspati*. The writ petitioner, the Mettur Chemical and Industrial Corporation, also manufactures soap. For the manufacture of either article groundnut oil is essential. In the case of certain commodities, sales of which are taxable under the Madras General Sales Tax Act at a single point, the Act provides that where any one of such articles is used as a component part in the manufacture of any other article liable to single point levy of tax, the sale of the first mentioned article shall be taxed at the concessional rate of 1 per cent only, instead of the rate specified in the First Schedule to the Act, which lists out articles liable to single point levy. Section 3 (3) of the Act, which provides for the lower rate of tax indicated, contains a proviso which is in these terms :

" Provided that the provisions of this sub-section shall not apply to any sale unless the dealer selling the goods furnishes to the Assessing Authority in the prescribed manner a declaration duly filled

* W. A. Nos. 291 and 292 of 1963. 30th September, 1964.

in and signed by the dealer to whom the goods are sold containing the prescribed particulars in a prescribed form obtained from the prescribed authority."

Both vegetable oils (Serial No. 20) and vegetable products (Serial No. 45) and soaps (Serial No. 37) find place in the First Schedule. The requirement of the section and the proviso referred to call upon the dealer who sells either vanaspati or soap, in the manufacture of which he uses groundnut oil, to furnish a declaration in the prescribed form. In such an event, the sale of vegetable oil, which is normally subject to a 3 per cent. rate of tax at a single point, is taxed in these circumstances only at 1 per cent. The petitioners in the two cases applied to the appropriate authority for being supplied with the requisite blank forms. The relevant rule is rule 22 of the Madras General Tax Rules. Broadly stated, this rule requires that the declaration shall be furnished in a particular form, and a blank declaration form should be obtained only from the Assessing Authority on application. The relevant declaration has to be filled in by the selling dealer and this has to be attached to the return of turnover of the assessee. The form itself is merely a declaration by the purchasing dealer (of groundnut oil in the present case) certifying that the goods purchased by him are for use by him as a component part of other goods specified in Schedule I. As stated already, the petitioners applied to the appropriate authority for the prescribed blank declaration forms. The Commercial Tax Officer refused to supply the forms, expressing his view that the raw materials used in the manufacture of the goods mentioned by the petitioner go in

" as ingredients in the manufacture and do not form separable component parts of such goods. The concession under sub-section (3) of section 3 is not, therefore, applicable in such cases,"

and this order of the Commercial Tax Officer was concurred in by the Deputy Commissioner of Commercial Taxes. It was the refusal to supply the forms that led to the filing of the Writ Petitions.

Veeraswami, J., examined the matter on merits and took the view that the concession would be available to the petitioners, who manufactured either *vanaspati* or soap with the use of groundnut oil as a component part thereof, and in that view directed the issue of writs.

In appeal, learned Counsel for the appellant-State sought to canvass the correctness of the interpretation of section 3 (3) of the Act. It seems to us however that in the light of the limited relief that was sought by the petitioners, it is unnecessary that this Court should at this stage give an authoritative interpretation of the proviso to section 3 (3) of the Act. The short question which the learned Judge had to decide was whether in the light of the Rules as they stand, the Department is entitled to refuse the supply of blank declaration forms to an assessee, and whether at the stage when an application for the supply of declaration forms is made, the Assessing Authority has the jurisdiction to determine whether the goods proposed to be manufactured by the appellant-assessee are goods in which other goods would form component parts or not.

It seems to us that the Departmental officials have wholly misconceived the extent of their jurisdiction at the stage at which they were called upon to deal with the matter. Section 3 (3) is in very wide terms. There are over 60 items listed in the First Schedule which are subject to the single point levy of tax. One or more of the goods may be capable of being used in the manufacture of other goods mentioned in the same Schedule. Before the goods are manufactured, the assessee has to purchase such goods as would form the raw material for the manufactured goods. It is at this stage that the assessee has to furnish a certificate in Form XVII to the dealer from whom he purchases such raw material and it is to enable him to make the purchase that this certificate has to be prepared and handed over to the selling dealer. Whether or not the concessional rate of tax would be available in respect of the sale of that raw material would be a matter to be considered at the time of the assessment of the turnover of the selling dealer. The mere issue of a blank declaration form to be used by the assessee, which blank form is supplied by the Department, does not for the mere reason that the Department supplies the form, determine the question that the transaction is eligible for the concessional rate of tax. Reading rule 22, it is abundantly clear that a dealer when he obtains the

blank declaration form is only expressing an intention that he proposes to manufacture the goods such as would come within the scope of section 3 (3). The form itself does not specify that he should at that stage certify to the nature of the particluar goods that he proposes to manufacture. The certificate is merely a broad statement that the goods which he purchases is for use in the manufacture of other goods contained in the First Schedule. The dealer is not expected to give any more particulars specifying the goods which he intends to manufacture out of the goods that he purchases. The form being so worded, it is difficult to see how the Assessing Authority can be deemed to have been conferred with jurisdiction to decide even at that stage that the manufacture of Goods-*A* with the use of Goods-*B* would not bring the case within the scope of section 3 (3). As we said the determination of the quantum of tax that has to be imposed, whether under section 3 (1), 3 (2) or 3(3), is a matter which is essentially a part of the assessment proceeding, and cannot be exercised at any earlier stage, unless the Rules specially require that to be done. It seems to us accordingly that the Departmental Officials were in error in pronouncing upon the validity of possible future claim which might be made by the assessee at the stage when he was merely asking for a form of declaration and nothing more.

While we agree with the conclusion reached by Veeraswami, J., that writs of *mandamus* should issue in these cases, we reach that conclusion on a different line of reasoning. In our opinion, it was not necessary for the learned Judge to have determined in the course of these writ proceedings whether the sale of vegetable oil, which went into the manufacture of *vanaspati* or soap would be eligible for the concessional rate of tax. Subject to these observations, we dismiss the Writ Appeals with costs. Counsel's fee (one set) Rs. 100.

R.M. ——— *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(Special Original Jurisdiction)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Workmen of R. P. David & Co., Salem, represented by the National Motor Workers' Union, Kitchipalayam, Salem. .. *Petitioner* *

v.

The Management of R. P. David & Co., Salem-2 and another. .. *Respondents.*

Industrial Dispute—Enquiry by domestic tribunal—Dismissal of employee—Violation of principles of natural justice—What amounts to—Examining witnesses out of order—If opposed to natural justice—Tribunal taking into consideration the earlier findings of a quasi-judicial authority on the same charge—If improper—Power of Court to interfere with findings—Scope of.

Where an order of dismissal in pursuance of a departmental enquiry against an individual is based on several charges even if one or more of those charges are found to be not sustainable, the order of punishment might be supported on the findings on the rest of the charges, if they are held to be proved. In such a case it will not be open to the High Court in a writ proceeding to quash the order of punishment.

There is no rule prescribing the order in which witnesses should be examined in a domestic enquiry. All that is necessary is that the Domestic Tribunal should consider only relevant evidence and give an opportunity to the person proceeded against for rebutting it.

Where a driver of a vehicle is charged with being guilty of over-speeding, the Domestic Tribunal holding an enqiry will be justified in taking into account the fact that the driver concerned was punished by a quasi-judicial authority after inquiry and determination of the very same issue. Where a Regional Transport Authority has passed an order suspending the driver's licence for the offence of over speeding and the order has become final against him, it will be a relevant piece of evidence which a tribunal conducting a domestic enquiry against the driver on the self-same charge of over-speeding on the same occasion. It will not be a case of the Domestic Tribunal basing its findings on the findings of a different tribunal. When a competent tribunal has adjudicated over the same matter and it has become final, there is no violation of the principles of natural justice if the Domestic Tribunal takes note of such adjudication in respect of an inquiry regarding the same charge against the same persons.

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* W. P. No. 607 of 1963. 13th November, 1964.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of *certiorari* calling for the records relating to the award of 2nd respondent in I.D. No. 8 of 1961 dated 31st May, 1961, published in the *Fort St. George Gazette*, dated 21st June, 1961, and quash the said award.

B. Lakshminarayana Reddi, for Petitioner.

M. R. Narayanaswami, for 1st Respondent.

K. Alagiriswamy, for the Additional Government Pleader on behalf of the 2nd Respondent.

The Court made the following

ORDER :—This Writ Petition is filed under Article 226 of the Constitution to quash an order of the Labour Court, Coimbatore in I.D. No. 8 of 1961. The petitioner is the workmen of R. P. David & Co., Salem, represented by the National Motor Workers Union. One Sriramulu was a bus driver under the first respondent-company, R. P. David & Co. Two charges were framed against him by the management. One is that, on 11th May, 1959, he was noticed by the District Medical Officer, Salem, over-speeding the bus that he was driving at the time. The second is that, on 10th September, 1959, he reached the Namakkal Bus Stand 30 minutes beyond the schedule time.

There is a history behind these two charges. Initially, the Regional Transport Authority took note of these allegations against the driver and suspended his driving licence for 15 days under each of the charges. The permit of the management was also suspended for three days. Thereafter, the management conducted a domestic enquiry into the charges. They appointed one Chelliah, the manager of the Company, as the Enquiry Officer. He submitted separate findings that the two charges were proved. The management also seems to have passed separate orders of dismissal on the two charges, directing them to take effect simultaneously.

The Labour Court found that the enquiry by the Domestic Tribunal was not vitiated and confirmed its decision when an industrial dispute arising out of the dismissal of the worker, came up for adjudication before it. The worker's case was taken up by the Union both before the Labour Court, and also before me in this Writ Petition.

It is contended by the petitioner herein that, without examining the District Medical Officer who actually detected the overspeeding of the bus the Domestic Tribunal was not entitled to rely upon the finding of the Regional Transport Authority on the basis of the District Medical Officer's report alleging overspeed. Before the Enquiry Officer the driver gave an explanation to the effect that there was no overspeeding at all and that the District Medical Officer had arrived at a wrong conclusion about overspeeding. It was therefore urged that there was a violation of the principles of natural justice in that the Domestic Tribunal did not give an opportunity to the worker to rebut the report of the District Medical Officer that there was overspeeding. But, as against this contention, it is submitted by learned Counsel appearing for the management that, the Regional Transport Authority had the duty to hold an enquiry of a quasi-judicial nature, and that it was only upon the basis of that enquiry, that it came to the decision to suspend the driver's licence under section 16 (1) of the Motor Vehicles Act for the offence of over-speeding. It has to give reasons for its conclusion. Its decision is subject to appeal by the aggrieved person to a prescribed Authority, namely, the State Transport Appellate Tribunal. It was therefore urged by the respondent that though at first glimpse it would appear as if the Domestic Tribunal acted on the finding of a different tribunal for holding the driver guilty under the first charge, weight had to be given to the fact that the tribunal in this case was one which exercised quasi-judicial powers, to adjudicate on the very same matter, namely, whether the driver was guilty of overspeeding or not. In *Jerome D'Silva* v. *Regional Transport Authority*[1] it was held that a quasi-judicial Tribunal like the Regional Transport

1. (1952) 1 M.L.J. 35.

Authority could not ignore the findings and orders of competent Criminal Courts in respect of an offence when the Tribunal proceeds to take any action on the basis of the commission of that offence. What is now claimed by the first respondent's learned Counsel is to extend this privilege granted in respect of the finding of a Criminal Court, to the finding of a quasi-judicial Tribunal for treating it as binding determination of a fact in issue, when the matter is brought subsequently before a Domestic Tribunal for enquiry. It has to be borne in mind that when the order suspending the driver's licence for over-speeding was passed by the Regional Transport Authority, it was exercising quasi-judicial powers, and it was also an appealable order. There is no evidence in this case that the driver appealed against the order of the Regional Transport Authority suspending his licence. Therefore the position of the driver is that his driving licence had been suspended by a quasi-judicial Authority on a finding which had become concluded against him, that he had over-speeded the bus which he was driving at that time. The substance of the first charge is really that he had been guilty of over-speeding and to prove this charge, the fact of his being punished by a quasi-judicial Authority which had the duty to determine the very same issue will be a relevant piece of evidence. From this point of view, it is not possible to hold that the finding of the Domestic Tribunal on the 1st charge is vitiated by violation of the principles of natural justice.

Taking the second point for consideration, the objection of the petitioner is to the effect that the Domestic Tribunal examined as Court witness, a conductor of the bus which the petitioner was driving at the relevant period. Reference is made to the record of the findings of the Domestic Tribunal where mention was made of the fact that the management did not seek to adduce oral evidence in the first instance. Thus the driver gave evidence and examined a witness on his behalf. At that stage, the Enquiry Officer made a note that he considered it necessary to summon the conductor who was examined as a Court witness, and he gave evidence in support of the charge that the bus driver, due to negligent driving, had reached the destination late. Learned Counsel for the petitioner urges that the manner in which this Court witness was examined after examination of the driver's witness is violative of the principles of natural justice. As against this, it is pointed out that the Enquiry Officer has mentioned the fact that the driver at the enquiry, did not demur to the course thus followed. Learned Counsel for the first respondent submits that, neither before the Tribunal nor in the affidavit to the petition in this Court, did the petitioner raise an objection that the statement of the Tribunal in this respect is erroneous. This apart, there is no rule, prescribing the order in which witnesses should be examined in a domestic enquiry. All that is necessary is that the Domestic Tribunal should consider only relevant evidence, and give an opportunity to the person proceeded against, for rebutting it. This has been clearly done in this case. There are also other requirements for the domestic enquiry—*bona fides* in holding the enquiry, the absence of victimisation, of unfair labour practice, etc. but with these we are not now concerned. I do not think that, in the circumstances, any violation of principles of natural justice took place when the management decided to examine the conductor after the examination of the driver and his witness. Learned Counsel for the first respondent also refers to a circumstance in regard to the explanation of the driver. The driver has explained that, because the management has not fixed any rules as to the place of taking in passengers at the starting point, he had necessarily to make several halts for the purpose and by the time he left the municipal limits of Salem, the starting station, it was already late. The finding of the Tribunal is that Rasipuram a place *en-route* was reached by the bus on that date at the due time and this was borne out by the entries of the time in the trip sheet. This was relied on by the management as a circumstance which would rebut the plea of the driver regarding excessive halts at the place of starting. This aspect of the matter appears to have weighed with the Domestic Tribunal, for its decision on the second charge relating to late arrival.

The decision of the Supreme Court in *State of Orissa* v. *Bidyabhushan*[1] is to the effect that, even if one or more out of several charges framed against an individual in a departmental enquiry is found not substantiated, the order of punishment might be supportable on the finding on the rest of the charges which were held to be proved. In such a case it will not open to the High Court in a writ proceeding to quash the order of punishment. Learned Counsel for the first respondent urged that the same rule would apply to this case, even if one were to hold that the finding on the first charge is vitiated for any reason, and if the finding on the second charge is upheld. But, as I have already mentioned, in my view, there are no substantial reasons even for interfering with the finding on the first charge. There is also the special feature in this case, namely, that the management passed two distinct orders of punishment on the findings in respect of each of the two charges, and directed that they would be effective simultaneously. This would show that it was the intention of the management to award the punishment of dismissal even on the second charge standing by itself. I, therefore, see no grounds to allow the Writ Petition which is dismissed. There will be no order as to costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN

A. Meenakshisundaram Pillai, Prop. Royal Press, Tirunelveli Junction .. *Petitioner* *

v.

N. L. Subbiah and others .. *Respondents.*

Industrial Disputes Act (*XIV of* 1947), *section* 25-*F*—*Power of Labour Court under*—*Right to receive compensation*—*Duty to decide first before ascertaining the quantum of compensation.*

Where in a claim for compensation under section 25-F of the Industrial Disputes Act the management disputes the very right of the workmen to receive any compensation it is the duty of the Labour Court to decide that question first before going into the computation of the quantum of compensation.

It is no doubt not necessary that in all cases the Labour Court should pass a speaking order. But where a specific issue is framed on a point in controversy, the Labour Court has to decide the issue judicially and makes it part of its order without leaving it to speculation whether the Court applied its mind at all to that aspect of the case.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writ of *certiorari* calling for the records relating to order dated 29th April, 1963, in Claim Petitions Nos. 220, 221 and 222 of 1962 on the file of the Labour Court, Madurai, and quash the said order and made therein.

K. Kumaraswamy Pillai, for Petitioner.

R. Gopalan, for the First Respondent.

The Court made the following

ORDER :—Three workmen formerly employed in the Royal Press, Tirunelveli, made claim before the Labour Court, Madurai, for compensation for the termination of their service on account of the closure of the aforesaid press. In the counter of the Management of the press, it was specifically alleged that, the Management had not closed the press, but, on the other hand, while the Manager was away in his village of Kalakkad, the workers themselves locked the press and went away, and that subsequently, the Manager came back and opened the press and set it working. An issue was framed by the Labour Court on this very same point :

"Did the petitioner lock the respondent's press and go away on his own accord putting a leave letter inside the shop and giving the key of the shop to the next-door fruit vendor ?"

The Labour Court did not give any decision on this issue but passed a short order :

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1. A.I.R. 1963 S.C. 779.

* W.P. Nos. 725 to 727 of 1963. 16th November, 1964.

"The petitions are allowed and the respondent is directed to pay the petitioners as follows." giving three amounts which should be paid to the three workmen. It is against this order that the Management has filed these three Writ Petitions under Article 226 of the Constitution.

It is submitted by the learned Counsel for the petitioner that where the Management disputes the very right which the workmen has claimed to receive payment of a certain sum of money after its computation, the Labour Court must deal with that question and decide whether the workmen had the right to receive the benefit, as alleged by him. It is only if the Labour Court answers this point in favour of the workmen that the next question of making the necessary computation arises. This is the view laid down by the Supreme Court in *Central Bank of India* v. *Rajagopalan*[1]. From the order of the Labour Court in this case, one is left to speculate whether the Labour Court did really apply its mind to the question raised by the Management that there was in fact no closure at all, and that as a consequence the workmen were not entitled to receive compensation under section 25-F of the Act for loss of their services. There can be cases where an authority need not pass a speaking order. But, in the present case, the Labour Court framed an issue and then also heard evidence. It has therefore to decide the issue judicially after setting out the evidence for and against and also the arguments *pro* and *con*. This is certainly not a case where the Labour Court can dispense with the writing of an order containing a reasoned conclusion. If such an order is written, then the question whether it can be corrected in writ proceedings will be a different matter. But where no order at all is written inspite of the fact that there was an issue and there was evidence, one is left to speculate whether the Labour Court had bestowed its attention at all on the point for decision, or whether it was under a misapprehension that the scope of its jurisdiction was only to make the computation of the compensation prayed for without giving a decision on the right that was also disputed before it.

I, therefore, quash the orders of the Labour Court in the three cases. The Labour Court will restore the petitions to its file and dispose them of according to law. There will be no costs in these petitions.

R.M. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

Abdul Hamid Sahib and others .. *Appellants* *

v.

Rahmat Bi .. *Respondents.*

Limitation Act (IX of 1908), Article 60—Deposit—Test—"Loan" and "deposit"—Distinction.

The terms 'loan' and 'deposit' are not mutually exclusive. There are a number of features common to both. In a sense a deposit is also a loan with this difference that it is a loan with something more. Both are debts repayable. When the repayment is to be made furnishes the real point of distinction between the two.

A loan is repayable the moment it is incurred while a deposit will be repayable on the maturity date if any fixed or on demand on the making of which the deposit will become repayable under the terms of the agreement relating to the same. Unlike a loan there is no immediate obligation to repay in cases of deposit.

Whether in a given case a debt is a loan or deposit will be one of fact to be decided on the facts and circumstances of each case. The use of the term 'loan' or 'deposit' may not in itself be conclusive, though it is a circumstance which could be taken into account.

Appeal against the decree of the Court of the Subordinate Judge, Vellore in Original Suit No. 125 of 1958.

N. C. Raghavachari and *N. S. Varadachari*, for Appellants.

T. R. Ramachandran, for Respondent.

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1. (1963) 2 L.L.J. 89.

* Appeal No. 394 of 1961. 3rd December, 1964.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal by the defendants arises out of a suit instituted by the respondent for recovery of Rs. 13,437-14-6 from the assets of her late husband Abdul Gaffur Sahib in the hands of the defendants. This sum was made up of four items of which Rs. 624 was claimed as *mahar* due to the respondent from her husband. This debt has been admitted by the defendants. The other three items are Rs. 7,000, another sum of Rs. 1,700 and a third sum of Rs. 4,113-14-6 said to have been paid by the respondent to her late husband on 4th September, 1948, 2nd September, 1953 and 22nd April, 1954, respectively. Her case was that these amounts were paid to her husband as deposits on the understanding that he might use the moneys as capital in his beedi business. Abdul Gaffur Sahib died on 12th November, 1958, leaving his widow, the respondent, and the defendants as his heirs, and, it is common ground the respondent is entitled to a quarter share and the defendants together to the remaining three-fourths. The main assets of Abdul Gaffur Sahib are stated to be a house bearing No. 136, Iqbal Street, Muslimpur, Vaniyambadi and also a goodwill and trade name in a beedi business known as S. I. R. Beedi. The respondent claimed that the amounts due to her should be paid out of these assets.

The claim was resisted by the defendants. They maintained that the sum of Rs. 7,000 represented the sale-proceeds of a shop which though stood in the name of the respondent, in fact, belonged to Abdul Gaffur Sahib and that the other items were merely book entries and the relative entries in the account books of Abdul Gaffur Sahib were false. In any case, they urged that the suit claim was barred by limitation on the ground that the first three items were not deposits but mere loans.

The learned Subordinate Judge found all the four items to be true and due from Abdul Gaffur Sahib. He also held that the first three items were in the nature of deposits and the suit was not therefore barred by limitation. The defendants having thus failed, they have appealed against the decree, the appeal being restricted only to the first three items.

In our view the finding of the Court below as to the factum of the first three items of debt is correct. Each of the three items is supported by the entries in the account books maintained by Abdul Gaffur Sahib. These entries have been proved either by the writer or a person who knows the hand-writing of the writer. The respondent herself in her evidence spoke to having paid the three items into the hands of her husband. We can find no justification for the contention that the account books were not maintained in the course of business, or, the entries therein were false. There is also satisfactory evidence as to the resource of the respondent. The defendants, as we consider, have not succeeded in establishing that the sum of Rs. 7,000 really belonged to the respondent's husband. On 1st September, 1948 by a sale deed of that date the respondent and her husband jointly conveyed a shop for a consideration of Rs. 7,500. The entry in the account books showing the advance of Rs. 7,000 to Abdul Gaffur Sahib is dated 4th September, 1948. The respondent's evidence is that she sold certain jewels of hers and out of the proceeds she purchased the shop from her husband. Her evidence in this regard is supported by the recital in Exhibit A-25, the sale deed dated 1st September, 1948. Beyond the assertion of the defendants, there is nothing to show that the sum of Rs. 7,000 did not belong to the respondent.

The second item also is borne out by the entry in the account books dated 2nd September, 1953. According to the respondent she carried on a business at Perambur which she transferred to her younger brother for a sum of Rs. 3,900 out of which she paid to her husband the sum of Rs. 1,700. That sale is evidenced by Exhibit A-13 dated 30th March, 1953. There is no mention in this document to support the case of the defendants that this business was owned by the respondent and her husband in common. It is true one of the witnesses of the respondent in cross-examination stated that the stores belonged to her and her husband. But

we are unable to accept this statement as correct because if it were a fact, it would undoubtedly have been mentioned in Exhibit A-13.

The last item also is found entered in the account books of Abdul Gaffur Sahib. The entry is dated 26th November, 1955 though the entire amount was supposed to have been advanced by 22nd April, 1954. It is seen from this entry that the amount was not paid in a lump but on different occasions. The respondent would say in her evidence that the amount was paid in a lump. Whether it was so or not, there is nothing to show that the sum of Rs. 4,500 was not in fact paid, whether in a lump or on different occasions, by the respondent to her husband. She would say that out of the sale proceeds under Exhibit A-13 she had a balance of about Rs. 2,200 and with this sum added with other moneys with her by sale of jewels, she made up the sum of Rs. 4,500. We think that this is probable. We are therefore satisfied that the Court below was right in finding that Abdul Gaffur Sahib in fact owed the three sums to the respondent.

That takes us to the question of limitation. As we said, the Court below considered the nature of the three items of debt to be deposits governed by Article 60 of the Limitation Act and the suit was, therefore, within time. The contention for the appellants is that this view is wrong and that the three items were no more than loans so that the suit would be barred by limitation. The point would, therefore, turn upon the distinction between a loan and a deposit. On that question learned Counsel for the appellants invited our attention to *Govind Chintaman* v. *(The Shop) Kachubhai Gulabchand*[1], *Ammalu Amma* v. *Narayanan Nair*[2] *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh*[3], *Kanhayalal* v. *Hiralal*[4], *Naithi* v. *Cherian*[5], *Annamalai* v. *Veerappa*[6] and *Balagurumurthy* v. *Chinnaswami*[7]. We do not think it necessary to refer to all of these authorities in detail.

The terms " loans " and " deposits " are not mutually exclusive terms. There are a number of common features between the two. In a sense a deposit is also a loan with this difference that it is a loan with something more. Both are debts repayable. But, when the repayment is to be, in our opinion, furnishes the real point of distinction between the two concepts. A loan is repayable the minute it is incurred. But this is not so with a deposit. Either the repayment will depend upon the maturity date fixed therefor or the terms of the agreement relating to the demand, on making of which the deposit will become repayable. In other words, unlike a loan there is no immediate obligation to repay in the case of a deposit. That we think is the essence of the distinction between a loan and a deposit. This view of ours is supported by the observations of the Privy Council in *Nawab Major Sir Mohammad Akbar Khan* v. *Attar Singh*[3].

> " The distinction which is perhaps the most obvious is that the deposit not for a fixed term does not seem to impose an immediate obligation on the depositee to seek out the depositor and repay him. He is to keep the money till asked for it. A demand by the depositor would, therefore, seem to be a normal condition of the obligation of the depositee to repay."

Earlier the Board pointed out that in effect a deposit is a loan under conditions. Although that is the distinction between a loan and a deposit, the question in a given case whether a debt is a deposit or a loan will be one of fact which will have to be decided on the facts and circumstances in each case. The use of the term " loan " or " deposit " may not in itself be conclusive though, of course, it is a circumstance which would be taken into account. What should be regarded is the cumulative effect of the evidence which bears on the character of the debt as a loan or a deposit.

On the facts of this case we can find no difficulty in accepting the trial Judge's finding that the three items constituted deposits. The entries relating to these items in the account books of Abdul Gaffur Sahib show that the amounts were

1. A.I.R. 1924 Bom. 28.
2. (1928) I.L.R. 51 Mad. 549.
3. (1936) 71 M.L.J. 712: L.R. 63 I.A. 279.
4. A.I.R. 1947 Bom. 255.
5. A.I.R. 1957 T.C. 237.
6. A.I.R. 1956 S.C. 12.
7. (1960) 2 M.L.J. 48: A.I.R. 1960 Mad. 264.

paid by the respondent to her husband to be used by the latter as capital in his business. That would indicate that the understanding between the parties was not that the husband would be under an immediate obligation the moment the sums were paid to him to repay the same. It was rather in their contemplation that the amounts might be used in the business of the husband and would only have to be repaid on demand. In fact, that is the evidence of the respondent herself. She said that her husband wanted the moneys stating that he would keep them and whenever she demanded the same he would return the amounts.

Learned Counsel for the appellants urged that the fact that Abdul Gaffur Sahib needed the moneys and wanted his wife to advance the same indicated that the transactions were loans. *Kanhayalal* v. *Hiralal*[1] is relied on in support. But the point is, that circumstance in itself, as we mentioned, is not conclusive on the nature of the transaction. We are satisfied in this case, on the facts we have just referred to, that the three sums constituted deposits. On that finding it follows that the suit was within time.

The appeal is dismissed with costs.

R.M. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* and MR. JUSTICE M. NATESAN.

Motimul Sowcar .. *Appellant**

v.

Visalakshi Ammal and others .. *Respondents.*

Civil Procedure Code (*V of* 1908)—*Section* 100—*Interference in Second Appeal with concurrent findings of facts by two Courts below.*

Transfer of Property Act (*IV of* 1882)—*Section* 41—*Equities under—Scope of.*

Except for the clearest and strongest of reasons, which could be held to be tantamount to interference on a question of law, the High Court in Second Appeal will have no jurisdiction to convert itself into a Court of first appeal and reverse a concurrent finding of fact.

In order to invoke the benefit of the equity enacted in section 41 of the Transfer of Property Act the transferee must satisfy two conditions. First the transferee should prove that the transferor was the ostensible owner of the property and that such ostensible owner was holding the property, with the consent, express or implied, of the real owner. The second condition to be fulfilled is that the transferee paid the consideration and acted in good faith after an enquiry conducted with due diligence or reasonable care. The mere fact that the real owner had previously controverted the claim of the ostensible owner will not disentitle him to advance his rights at a later stage, when the ostensible owner purports to act upon his ostensible title.

Appeals under clause 15 of the Letters Patent against the Judgment and decree of the Honourable Mr. Justice Venkatadri, dated 23rd March, 1963 and passed in S. A. No. 1389 of 1960 preferred to the High Court against the decree of the City Civil Court at Madras in A. S. No. 252 of 1958 (O.S. No. 1555 of 1957, City Civil Court at Madras).

C. R. Krishna Rao, for Appellant.

Ayyar and *Dolia*, for Respondents.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—S.A. No. 1389 of 1960 related to a suit filed in the City Civil Court by a certain Visalakshi Ammal (plaintiff) for a declaration that she was the absolute owner of the superstructure in premises comprising Door No. 21, Brodies Road, Mylapore. The suit was decreed by the learned Assistant Judge, who gave a finding that the plaintiff was the owner of the mortgaged property in controversy, and also a consequential declaration that the mortgage, executed by Maduraimuthu Naicker, husband of the plaintiff, would not bind the plaintiff

1. A.I.R. 1947 Bom. 255.

* L.P.A. Nos. 111 and 120 of 1963. *8th December*, 1964.

with regard to her interest in the property, *i.e.*, the proprietary interest in the superstructure. The first defendant-mortgagee preferred a First Appeal to the Principal Judge of the City Civil Court. That Court confirmed the findings of the trial Court and dismissed the appeal.

The first defendant-mortgagee thereupon instituted S.A. No. 1389 of 1960, which came up for hearing and disposal before Venkatadri, J. The learned Judge went into the evidence, upon which the concurrent findings of fact of the Courts below were based. He then furnished his dissenting conclusion on the main issue of fact in the following form :

"There is sufficient material to come to the conclusion that the suit property might have belonged to both the husband and the wife. It might have been that Visalakshi Ammal might have constructed the superstructure partly from out of her funds. There is no evidence to show that the entire superstructure was built by Visalakshi Ammal. In the circumstances, I declare that the property belongs both to Maduraimuthu Naicker and Visalakshi Ammal."

There was a further contention raised on behalf of the appellant (mortgagee) before the learned Judge that, in any event, the appellant was entitled to the benefit of the equity enacted as section 41 of the Transfer of Property Act. The learned Judge (Venkatadri, J.) cited a passage from *Sethumadhava Ayyar* v. *Bacha Bibi*[1] and came to the conclusion that the mortgagee was entitled to this benefit, in any view. Ultimately, he reversed the findings of the Courts below, and held that both the plaintiff (Visalakshi Ammal) and her husband were the owners, but that the mortgagee would be entitled to work out his remedies only against the right, title and interest of the husband, Maduraimuthu Naicker. Both parties have preferred the appeals, under the Letters Patent, which are now before us.

We might immediately set forth, quite tersely, the questions that now arise for our determination. Firstly, there is the question whether, in Second Appeal, this Court could interfere with a concurrent finding of fact by two Courts below, where no question of law is involved, and where it is not established that there is some failure to consider essential evidence, or some infirmity or defect in the procedure, which would amount to a question of law. Secondly, there is the problem whether, on the merits of the evidence, the learned Judge (Venkatadri, J.) had justification, even assuming that there could be interference in Second Appeal, for differing from the Courts below, and arriving at the conclusion of fact which he has actually reached. Thirdly, there is the question whether the equity embodied in section 41 of the Transfer of Property Act could at all be invoked by, the appellant before the learned Judge, the mortgagee, in the light of the established facts.

We shall take up the second of these questions first, because it seems to us that there were very powerful reasons for the Courts below to hold, on the merits, that the superstructure was the exclusive property of the plaintiff (Visalakshi Ammal), and that she had fully succeeded in establishing that claim. Indisputably, the site itself is leasehold, and the ownership vested in a Devasthanam (Sri Kapaleswarar Temple). There was a prior lease in favour of a third party, and, in September, 1936, Maduraimuthu Naicker, the husband of the plaintiff, took the site on lease. There is no controversy concerning the leasehold interest in the site possessed by Maduraimuthu Naicker. But the case of the plaintiff (Visalakshi Ammal) was that it was she who erected the superstructure, from out of her own funds, that her husband had no concern with this construction, that his moneys did not contribute to it in any manner, and that he was not an owner of the superstructure to any degree or extent. The trial Court discussed the evidence at considerable length and laid stress on those aspects of evidence which went far, in its view, to prove the claim of the plaintiff. We do not think it is necessary to reiterate these aspects in detail. It is sufficient for us to emphasise a few facts. There was voluminous documentary evidence adduced by the plaintiff, according to the Court of trial, in support of her case. The plaintiff dealt with the superstructure by way of mortgagee in 1945 and 1946, and that certainly shows that she exercised acts of dominion over this property ; on the evidence, it was clear that she had *stridhanam*

1. A.I.R. 1928 Mad. 778.

funds, and there was a great deal of evidence to show that the construction was probably from her assets. The plaintiff entered into an agreement with the Corporation of Madras for a part of the construction, comprising a flush-out latrine. The Municipal Authorities had recognised her as the owner of the premises. On this aspect, it is sufficient for us to state that both the trial Court and the first appellate Court have rightly laid emphasis on the Municipal Registry in favour of the plaintiff, *viz.*, Exhibits A-5 and A-6 for the periods 1945-46 and 1952-53. There were also municipal tax receipts produced by the plaintiff.

In the face of this evidence, and we are now limiting the discussion to the question of the superstructure—the defendant relied purely upon the fact that Maduraimuthu Naicker also might have possessed funds, at least according to a view adumbrated by the first appellate Court, and the fact that Maduraimuthu Naicker applied for the building permit (Exhibit D-1, dated 15th August, 1938), which document further indicated that permission was granted in his name. In addition to this, there were only certain receipts for municipal tax paid, produced by Maduraimuthu Naicker, which did not bear the name of the person paying the taxes. The Courts below referred to this aspect. They pointed out that, at a certain stage, quarrels arose between the husband and wife, and that Maduraimuthu Naicker might have obtained possession of those receipts, which were originally in the possession of the plaintiff. The mere fact that, at one stage, the husband applied for permission to erect a construction, was no safe guide for an inference that the construction belonged to the husband, or, that his moneys contributed to it. On the contrary, the Courts heavily stressed the other probabilities and circumstances supporting the claim of the plaintiff (Visalakshmi Ammal) that she alone had erected the superstructure. Ultimately, the trial Court and the first appellate Court concurred in the finding that the superstructure was exclusively the property of the wife, erected from her funds. We may add that there were two mortgages of the property, and that the second mortgage was taken by the defendant (mortgagee) after Visalakshi Ammal had actually issued a notice advancing her claim to the superstructure.

It is in the light of these facts that we have to regard the conclusion of the learned Judge (Venkatadri, J.) that the husband also probably contributed to the superstructure, and that the superstructure must be held to be the property of both. We have already indicated the very heavy evidence in favour of the claim of the wife, relied on by both the Courts below. Under these circumstances, we are unable, with great respect, to agree with the learned Judge (Venkatadri, J.) in his view that there was " sufficient material to come to a conclusion that the suit property might have belonged to both the husband and the wife." On the contrary, the evidence, as it stands, seems to support only one inference or conclusion that the suit property, *viz.*, the superstructure, was built by Visalakshi Ammal from her resources, and that it exclusively belonged to her. An opposite inference cannot be rested merely upon the fact that the husband applied for the building permit, or that he is able to produce one or two receipts which do not contain the name of the person making the contribution. Learned Counsel for the mortgagee has not been able to show an iota of evidence which would take away from the force of the Municipal Registry in favour of the wife, which covers a substantial part of the period since the erection of the superstructure.

Even otherwise, it is very doubtful if this Court could, in Second Appeal, reverse such a concurrent finding of fact, except for the clearest and strongest of reasons, which could be held to be tantamount to interference on a question of law. It is sufficient to refer to the following authorities of the Supreme Court in support of this proposition. In *L. Pattabhi Ramaswamy* v. *S. Hanymayya*[1]. Their Lordships observed, citing with approval an observation of the Judicial Committee in 1891, that, upon an exclusive question of fact, even though erroneous, the High Court would have no jurisdiction even to entertain a Second Appeal. They referred to a long catena of decisions ~~affirming the same~~ principle, and emphasised that, if

1. A.I.R. 1959 S.C. 57.

the question to be decided was one of fact, High Courts could not convert themselves into Courts of First Appeal, and assume or exercise a jurisdiction which, they did not possess. There are two other decisions of the Supreme Court which have to be referred to in this context, *viz.*, *Ramachandra* v. *Ramalingam*[1] and *Ramappa* v. *Bojjappa*[2] The second of these decisions emphasises that, though the admissibility of certain evidence may be a point of law, once it was shown that admissible and relevant evidence had been acted upon by the Courts below, it was not open to an aggrieved party in Second Appeal, to contend that the evidence was not sufficient to justify the finding of fact. The decision in *Ramachandra* v. *Ramalingam*[1] also stresses that, unless there is a total absence of evidence, or some other infirmity which will show that there has been a substantial defect or error in the finding, the High Court would not be justified in interference in Second Appeal. Hence, we have no hesitation in coming to the conclusion that this was not a case in which this Court would even have jurisdiction to reverse the main finding of fact, concurrently arrived at by the Court of trial and by the Court of First Appeal. Nor can we be satisfied, on the actual material adduced, that the reversal of that concurrent finding was justified. We feel constrained, therefore, to differ from the learned Judge, and to hold that it has been unambiguously established by cogent and acceptable evidence that the leasehold interest alone inhered in the husband, Maduraimuthu Naicker, and that the wife (Visalakshi Ammal) was the exclusive owner of the superstructure.

One other question that arises for determination is whether, under the circumstances of the two mortgagee in favour of the defendant or at least the first of them, which was entered into before the wife issued her notice of protest, the transferee could invoke the benefit of the equity embodied in section 41 of the Transfer of Property Act. The learned Judge (Venkatadri, J.) held that he could do so, because, as the learned Judge points but, the mortgagee appears to have made some kind of *bona fide* enquiry, within the scope of the observations in *Sethumadhava Ayyar* v. *Bacha Bibi*[3].

We are afraid that this overlooks one vital aspect of the equity embodied in section 41 of the Transfer of Property Act. That section has been cited and expounded in numerous decisions, and it is unnecessary, for our present purpose, to refer to the case-law at any length. But, as will be clear from one of the leading decisions enunciating the principle of the equity, *viz.*, the Bench decision in *Sahul Hamid* v. *Sulthan*[4] there are really two conditions to be fulfilled before the benefit could be invoked. The transferee must first prove that the transferor was the ostensible owner of the property and that such ostensible owner was holding the property, with the consent, express or implied, of the real owner. The second condition or term is that the transferee paid the consideration and acted in good faith, after an enquiry conducted with due diligence, or reasonable care. It is not enough that a transferee, however *bona fide* takes the property in good faith, if the real owner is not standing by, acquiescing, expressly or by implication, in an ostensible owner holding out the title. In the present case, as far as the superstructure is concerned, there is no ostensible ownership at all, nor even a trace or indication of it. The leasehold interest, no doubt, belonged to the husband ; but we are not aware of any principle of law that a lessee must be presumed to have built the superstructure upon a land comprised in the lease, and that no one else should be thought to have done so. There was no document of title which Maduraimuthu Naicker could put forward, or did put forward, as far as the superstructure was concerned, except the single document giving him permission to build. Obviously, that is not a document of title to the superstructure ; at best, it is only evidence of an intention on the part of the husband (Maduraimuthu Naicker) to build on the demised land. In the absence of any ostensible ownership, inhering in the husband, the question of the equity hardly arises. Again, it cannot even be said that the transferee (mortgagee) had made due enquiry, or exhibited the required diligence. Any alienee, under such circumstances, would have first ascertained the facts of the

1. A.I.R. 1963 S.C. 302.
2. A.I.R. 1963 S.C. 1633.
3. A.I.R. 1928 Mad. 778.
4. (1947) 1 M.L.J. 20.

Municipal Registry regarding the superstructure, before making a loan on the security of both the leasehold land and the superstructure thereon. The Registry was indisputably in favour of the wife.

Learned Counsel has drawn our attention to a decision of a single Judge of this Court, viz., *Syed Fakruddin Saib* v. *Katta Ramayya Setti*[1]. That was a judgment of Somayya, J., in which the learned Judge held that the transferee would be protected under section 41, even if the real owner had, prior to the transfer, unsuccessfully attempted to assert his exclusive rights to the property, in certain criminal proceedings. But, when we look at the facts of that case, we see that it is clearly distinguishable, and, indeed, that it has little relevance to the present context. That was a case in which a certain Bhandigi Sahib was the ostensible owner, by virtue of an actual document of sale in his favour from the previous owner. Not merely this ; but the ostensible owner also executed a mortgage in favour of a third party, and exercised acts of dominion. Under these circumstances, the later transferee, a certain Katta Ramayya Setti, had every reason to honestly believe that the ostensible owner was the real owner. The learned Judge then referred to certain prior criminal proceedings, wherein the real owner had attempted to controvert the claims of the ostensible owner, and held that those proceedings did not disentitle the transferee to the benefits of section 41. The statute itself is very clear, regarding the requirements to be satisfied before the equity could be invoked by a transferee. We are unable to see that this decision *Syed Fakruddin Saib* v. *Kotta Ramayya Setti*[1] lays down any different principle and, actually, we are not at all clear that this decision would be authority for the view that, under all conceivable circumstances, where the real owner had previously controverted the claim of the ostensible owner, the real owner would, nevertheless, be later disentitled to advance his rights, if the ostensible owner subsequently acts upon his ostensible title. We do not think that it is necessary to discuss that aspect further.

In the result, therefore, we are constrained to allow the appeal by the plaintiff in the trial Court, to hold that she is the exclusive owner of the superstructure, and that her rights will be unaffected by the rights of the mortgagee. The mortgagee (the other appellant) will therefore have rights in respect of his mortgage only over the leasehold interest possessed by the mortgagor in the land itself. The appeal by the mortgagee is therefore, dismissed, and the appeal by the plaintiff allowed. But we direct the parties to bear their own costs throughout, in view of the facts of the history of this itigation.

R.M. ——— *Appeal by plaintiff allowed. Appea by mortgagee dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Appellate Jurisdiction).

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

Kumaraswami Gounder .. *Petitioner* *

v.

The Joint Collector, Coimbatore and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Remedy under—If could be invoked to decide controversial questions of fact.*

Madras Village Panchayats Act (*XXXV of* 1958)—*Sections* 27 *and* 28—*Disqualification of members—Matter in controversy—If could be raised in a writ proceedings challenging the validity of a no-confidence motion passed at a meeting.*

The Madras Village Panchayats Act provides for a machinery to decide questions relating to disqualification of members of a panchayat. Where a controversy is raised relating to a matter of this character such controversial facts should be decided only by the machinery provided under the Act. The jurisdiction of the High Court under Article 226 of the Constitution cannot be invoked to investigate into disputed questions of fact and give relief on that basis.

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1. (1944) 1 M.L.J. 125.

* W.A. No. 375 of 1964. 10th December, 1964.

Where a 'no-confidence' motion has been passed by a Panchayat against its President, it is not open to the aggrieved President to challenge the validity of the resolution in proceedings under Article 226 of the Constitution on the ground that the members of the Panchayat who voted for the resolution were disqualified, especially when the controversy was raised at the meeting and it was found against.

Appeal under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Srinivasan, dated 2nd December, 1964 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 415 of 1964 presented under Article 226 of the Constitution of India to issue a writ of *certiorari* calling for the records connected with the order of the Joint Collector of Coimbatore, dated 10th March, 1964 and made in Reference No. 9518/64B-4 removing the petitioner from the post of the President of Ukkaram Panchayat and quash the said order and made therein.

S. Sethuratnam, for Appellant.

The Court made the following

ORDER.—We are definitely of the view that the admission of this writ appeal would be outside the true function and scope of the jurisdiction under Article 226 of the Constitution. Briefly stated, the facts are that the appellant was the President of Ukkaram Panchayat and he filed W.P. No. 415 of 1964 before Srinivasan, J., for the issue of a writ of *certiorari*, quashing the Order of the Joint Collector, Coimbatore, removing the petitioner from the post of President, consequent upon what the Collector held to be a valid motion of "no-confidence" passed against the President.

The Writ Petitioner contended before the learned Judge (Srinivasan, J.), that, though, undoubtedly, there was such a motion of 'no-confidence' passed against him, it was not a valid resolution, because, four of the participating members had become disqualified by reason of non-attendance at three consecutive meetings of the Panchayat. On this aspect, there was a controversy on a question of fact before the learned Judge, regarding the last meeting alleged to have been convened on 7th November, 1963. The learned Judge pointed out that the version of the President (Petitioner before him) that a meeting took place on 7th November, 1963, could not be accepted, for the reasons stressed by the learned Judge. The consequence was that the ground of disqualification advanced, viz., non-attendance at three consecutive meetings by the concerned members, failed to be established. Further, the Tahsildar, who had the duty to determine any urgent question or point of order arising during the course of a proceeding, did consider this question of the alleged disqualification of the members, and decided that that objection was not sustainable, and that the vote of 'no-confidence' was validly passed. The learned Judge finally concluded that there was no room for interference in writ jurisdiction.

Before us, the same grounds have been reiterated. Learned Counsel stresses that, under section 27 (2) of Madras Act XXXV of 1958, the matter ought to have been placed before the next meeting of the Panchayat, but that the President (writ petitioner) could not do this, as it was held that he had forfeited the right to office by reason of the valid 'no-confidence' motion. In our view, where an Act itself provides a statutory mode of determining a controversy of fact of this character, it would be wholly out of place for a party, a claiming to be aggrieved, to seek relief at the hands of this Court under Article 226 and virtually to convert that jurisdiction into a trial on an issue of fact. It is sufficient for us to point out that section 28 (1) of Madras Act XXXV of 1958 makes explicit provision for determination of any question of alleged disqualification of a member where there is a dispute in this matter, and there is a further prescription of a judicial authority who has to be approached for a conclusion on the dispute, 'whose decision shall be final.' Under these circumstances, we are quite unable to see how the writ petitioner (appellant) would be in order in approaching this Court, invoking its writ jurisdiction virtually to undertake an investigation into a disputed question of fact, and to give relief on that basis. In the light of this principle, the writ appeal cannot be entertained, and it is dismissed *in limine*.

R.M. ——— *Appeal dismissed* in limine.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

A. Susiah .. *Appellant* * (*Complainant*)

v.

S. Muniswamy .. *Respondent.*

Copyright Act (*XIV of* 1957), *section* 63—*Infringement of copyright in literary work—One of the two joint authors' right to sustain criminal action without impleading the other author.*

What is required under section 63 of the Copyright Act for an action in respect of an offence is that the accused must have knowingly infringed or abetted the infringement of the copyright in a work, or any other right conferred by the Copyright Act. Where, therefore, one of the two joint authors of a literary work files a complaint against the respondent for an offence punishable under section 63 of the Copyright Act alleging that the respondent has infringed his copyright, what the Court has to consider is (*a*) whether there is any infringement of the copyright in the work concerned and (*b*) whether such infringement is with the requisite knowledge. If the answers to both the questions is in the affirmative the respondent will be liable for punishment under section 63. It will not be correct to say that where an offence has been committed in respect of a literary work of two joint authors, as for instance the infringement of copyright, one of them who is aggrieved would not be entitled to sustain a criminal action for the offence without impleading the other joint author.

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) of offences under section 63 of the Copyright Act, 1957 (XIV of 1957) by the Seventh Presidency Magistrate, Egmore, Madras, in C.C. No. 1195 of 1963 on his file.

H. Devadoss for *J. Samuel* and *S. Adaikalam*, for Appellant.

S. A. Rajan, for Respondent.

The Court delivered the following

JUDGMENT.—This is an appeal against acquittal. The appellant filed a complaint against the respondent for an offence punishable under section 63 of the Copyright Act, 1957 alleging that the respondent had infringed his copyright in what he claimed as a literary work called 'Topics in World History' of which he along with one Mr. S. Rajendran were joint authors. This work was first published by the appellant and Mr. Rajendran in 1957 ; but two other editions of the same work are said to have have been published by the respondent, one printed at Vasu Press, Triplicane and the other, at the Midland Printers, Vepery, Madras. The appellant contended that since the respondent infringed the copyright he committed an offence under section 63 and that the infringing copies are liable to be seized under section 64 of the Act.

The Seventh Presidency Magistrate who tried the case found that 'The Topics in World History' is an original literary work and that the respondent had reprinted the book at Vasu Press of P.W. 2 and also at the Midland Printers of P.W. 3. The plea of the respondent was that the joint author of the work, Rajendran, had permitted him to reprint the book and therefore, he had not infringed any copyright. The respondent also examined himself as D.W. 2 and stated *inter alia* that he had met the appellant in 1961 and he had agreed to his publishing the book. The learned Magistrate does not appear to have very much relied upon this plea. On the other hand, he seems to have considered the question and decided the case from the point of view of the rights of one of the joint authors to sustain a criminal action for infringement. According to him the Act sets out a clear distinction between civil and criminal remedies. It is only where a party wants to seek his remedy in a civil Court, it is not incumbent on him to make the joint owner a party to such suit. But this remedy is not specifically mentioned in Chapter XIII of the Act so that when a person has to seek his remedy in a criminal Court he has to implead the joint author as well. He further observed that the right claimed by the appellant is an indivisible one which cannot be demarcated and that when a person is prose-

* Cr. A. No. 459 of 1963. 30th March, 1965.

cuted for infringement of a copyright, it must be established that the complainant has absolute right over the copyright. On this reasoning, he took the view that the appellant, by himself, could not have taken action against the respondent criminally and that the joint author Rajendran should also have been impleaded in the action. The acquittal of the respondent was based mainly on this line of reasoning.

I am afraid, the aforesaid view of the trial Magistrate is not supportable on a reading of the relevant provisions of the Act. Chapter XI of the Act deals with infringement of copyright; and on the facts proved in this case it can hardly be contended that there was no infringement of the work in the absence of a licence, in writing, granted by the owners of the copyright when the work in question has been found to be a literary work. Two kinds of remedies are made available in respect of such infringement; one civil and the other criminal and they are dealt with in Chapters XII and XIII under headings "Civil Remedies" and "Offences."

What is required under section 63 of Chapter XIII for an action in respect of an offence is, to quote the language of the section;

> "knowingly infringes or abets the infringement of
> (a) the copyright in a work, or
> (b) any other right conferred by this Act.........."

The word 'infringes' has not been defined in the Act; but "infringing copy." so far as is relevant for our purpose, has been defined in section 2 (*m*) of the Act to mean, in relation to literary work, a reproduction thereof otherwise than in the form of a cinematograph film, if such reproduction is made in contravention of the provisions of the Act. Under section 13, a copyright shall subsist throughout India in literary works and this right, for the purpose of the Act as defined in section 14, means the exclusive right, by virtue of, and subject to the provisions of the Act (to quote only the relevant portion) to do and authorise the doing of the following acts viz. (1) to reproduce the work in any material form; and (ii) to publish the work. Section 17 of the Act declares the author of a work as the first owner of the copyright therein; and section 18 deals with the assignment of copyright. The mode of such assignment as laid down by section 19 should be in writing signed by the assignor or by his duly authorised agent and unless this was done, no assignment of the copyright in any work shall be valid.

The only relevant points for the learned Magistrate to consider therefore were (1) whether there was any infringement of the copyright in the work concerned in this case and (2) whether such infringement was with the requisite knowledge. On both these points, on the evidence accepted by the learned Magistrate, he could have come only to an affirmative conclusion; but he chose to decide the case by drawing a distinction between civil remedies and offences, relying for his support on section 56 which appears under Chapter XII and relates to protection of separate rights. That section is to the effect that

> "Subject to the provisions of this Act, where the several rights comprising the copyright in any work are owned by different persons, the owner of any such right shall, to the extent of that right, be entitled to the remedies provided by this Act and may individually enforce such right by means of any suit, action or other proceeding without making the owner of any other right a party to such suit, action or proceeding."

I am unable to share the learned Magistrate's view that where an offence has been committed in respect of a literary work of two joint authors, as for instance, the infringement of copyright, one of them who is aggrieved, would not be entitled to maintain a criminal action for the offence.

In this particular case, the plea taken by the respondent was wholly untenable. The reproduction of the work in which undoubtedly both the appellant and Mr. Rajendran had copyright amounted to an infringement of the said right. The plea that Rajendran had given him consent and that he had paid him a sum of Rs. 200 had not been substantiated by him by calling in Rajendran. As a matter of fact there was nothing in writing granted by Mr. Rajendran, though it would

still be a question even if there was any whether in the absence of a similar grant in writing from the appellant, the respondent would be entitled to reproduce the work as had been done by him.

At one stage, the appellant it would appear was prepared to condone the offence; but another edition of the work was brought out by the respondent with impunity. In the circumstances, I have no doubt that the respondent had committed an offence punishable under section 63 of the Act. Accordingly I set aside the acquittal of the respondent, convict him under section 63 of the Copyright Act, 1957 and sentence him to pay a fine of Rs. 100 within three weeks from this date; in default, he will undergo simple imprisonment for four weeks. There is no material on record to invoke section 64 of the Act as prayed for by the appellant.

V.K. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. S. RAMAMURTI.

Thankian .. *Petitioner.**

Madras Prohibition Act (I of 1937)—Applicability—Has no operation beyond the territorial limits of the State of Madras.

The Madras Prohibition Act (I of 1937) extends only to the State of Madras and it is obvious that any act of omission or commission which constitutes an offence under the Madras Prohibition Act should be committed within the limits of the State of Madras. The Act has no operation beyond the territorial limits of the State of Madras. Prosecution under the Madras Prohibition Act in respect of an offence committed within the boundary limits of the State of Kerala and outside the limits of the State of Madras would be incompetent. The fact that the same act is made an offence under a corresponding provision of the Travancore-Cochin Prohibition Act on the same pattern as the Madras Act cannot alter this position.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Sessions Judge, Kanyakumari Division at Nagercoil in C.A. No. 49 of 1964 (C.C. 222 of 1964, Additional First-class Magistrate, Kuzhithurai).

S. Mahadevan, for Petitioner.

S. R. Srinivasan, for the Public Prosecutor, on behalf of State.

The Court made the following

ORDER.—The petitioner in this case was charged and convicted for an offence under section 4 (1) (*b*) of the Madras Prohibition Act and sentenced to rigorous imprisonment for six months and a fine of Rs. 200 in default to rigorous imprisonment for three months, for having distilled and manufactured illicit arrack. The case for the prosecution was that on 10th February, 1964 at about 1 P.M. there was a prohibition raid in the hill area at Pannimalai in Kalaiyal Village, and during that raid the Head Constable (P.W. 1) accompanied by the Constable (P.W. 2), apprehended the accused (petitioner) distilling arrack in a still. He was immediately arrested and the material objects were seized under a mahazar, Exhibit P-1. The wash was destroyed after taking a sample. Both the Courts below have found the accused guilty, basing their finding on the evidence of P.Ws. 1 and 2. I am satisfied that the finding of guilty is correct and supported by adequate evidence.

Even so, learned Counsel for the petitioner urged that as the offence in question took place in an area within the boundary limits of the State of Kerala and outside the limits of the State of Madras, there cannot be a prosecution under the provisions of the Madras Prohibition Act. The learned Sessions Judge has overruled this objection in paragraph 7 of his judgment. The ground on which the learned Sessions Judge has held that action could be taken for an offence under the provisions of the Madras Prohibition Act is that a trial under the Act will have to be conducted in accordance with the provisions of the Criminal Procedure Code. The

* Cr. R. C. No. 1353 of 1964 (Cr. R. P. No. 1327 of 1964). 5th March, 1965.

other reason relied on by the learned Sessions Judge is that there is a corresponding provision in the Travancore-Cochin Prohibition Act making it an offence to distil and manufacture illicit arrack on the same pattern as the Madras Act. Neither of these reasons mentioned by him has any relevance to the question to be decided. The learned Sessions Judge has overlooked the obvious thing that the Madras Prohibition Act I of 1937, extends only to the State of Madras and it is obvious that any act of omission or commission which constitutes an offence under the Madras Prohibition Act should be committed within the limits of the State of Madras. The Act has no operation beyond the territorial limits of the State of Madras. If the same offence has been made an offence under the Travancore-Cochin Act also, it may be that the accused would be liable to be proceeded against under that enactment. But surely that is not a ground for holding that the accused is guilty of an infringement of the provisions of the Madras Act. I have no hesitation in holding that the prosecution in respect of an offence committed outside the State of Madras is wholly misconceived and incompetent. The Revision is allowed and the conviction and sentence of the petitioner are, therefore, set aside and the petitioner is acquitted. The fine, if paid, shall be refunded.

V.K. ———— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

A. Sambandan and another .. *Petitioners* *

v.

C. Natesan by power Agent S. Kuppusamy Padayachi .. *Respondent.*

Criminal Procedure Code (V of 1898), sections 435, 429 and 215—Offence of adultery—Husband in Malaya—Inability to proceed to India to file a complaint—Not a ground for empowering an agent to file complaint—Complaint incompetent.

Under section 199 of the Criminal Procedure Code no Court shall take cognizance of an offence under section 497 or 498 of the Penal Code except upon the complaint made by the husband of the woman or in his absence made with leave of the Court by some person who had care of such woman on his behalf at the time when such offence of adultery was committed. The fact that the husband was in Malaya and unable to proceed to India to file a complaint will not be sufficient to authorise the power-of-attorney agent to file the complaint. Such a complaint would be incompetent and has to be quashed.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Additional I Class Magistrate, Mayuram, dated 12th February, 1964 and made in C.C. No. 20 of 1964, etc.

G. Gopalaswami, for Petitioners.

M. P. Sundararajan, for Respondent.

The Court made the following

ORDER.—These petitions have been filed by one Sambandam and Kalyani: (1) against the order of the Additional First Class Magistrate of Mayuram granting permission to the power-of-attorney holder of the respondent to file a complaint against the petitioners under sections 497 and 498, Indian Penal Code and (2) to quash the proceedings in C.C. No. 20 of 1964 taken on the complaint filed by the said power-of-attorney.

The objection raised in the first petition is that the power-of-attorney holder was not competent to file the complaint on behalf of the respondent Natesan, the husband of the 2nd petitioner's daughter, and the objection raised in the second petition is that, the incompetent institution of the complaint has made it a nullity and therefore the proceeding is liable to be quashed.

The learned First Class Magistrate apparently granted permission in this case to file the complaint without notice to the accused. The order is very cryptic

* Cr.R.C. No. 428 of 1964, Cr. R.P. No. 419 of 1964 and Cr.M.P. No. 545 of 1964. 8th April, 1965.

and reads "permitted to file the complaint." Under section 199, Criminal Procedure Code, no Court shall take cognizance of an offence under section 497 or 498, Indian Penal Code except upon a complaint made by the husband of the woman or in his absence, made with the leave of the Court by some person who had care of such woman on his behalf at the time when such offence was committed. It is not seriously contended that the circumstances which justify an agent to file a complaint have been satisfied in the present case. Natesan is stated to be in Malaya and the only reason given by him in the power-of-attorney is that because he is unable to proceed to India to file a complaint, he has authorised the power of-attorney to file the complaint. Such a ground is not countenanced by section 199, Criminal Procedure Code. In the circumstances, I have to hold that the complaint filed by the agent Kuppuswami Padayachi is incompetent and necessarily, the complaint filed by him has to be quashed.

Both these petitions are accordingly allowed and the proceedings are quashed.

V.S. — *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTI.

Corporation of Madras .. *Appellant**

v.

Elumalai Pillai .. *Respondent.*

Prevention of Food Adulteration Act (*XXXVII of* 1954), *sections* 7 *and* 16, 10 (7)—*Adulteration of milk—Taking signature of two witnesses at the time of seizure of sample, as far as possible—Procedure—Tests of adulteration—Freezing point test—Fair and safe method of determining added water.*

The expression 'as far as possible' in section 10 (7) of Act XXXVII of 1954 is intended to obviate the necessity of the presence of two persons and securing their signature if circumstances under which he takes the sample were such that there cannot possibly be two persons present at the time. The present case was not one where witnesses had not been requisitioned but where the testifying witnesses have not fully supported to prosecution case and therefore the question was one of appreciation of their evidence in the light of the evidence of the Food Inspector and not a case for the application of the rule relating to securing the signature of two persons 'as far as possible' laid down in section 10 (7). In determining the amount of added water in milk the freezing point test is the fair and safe method. Since the test has not been attempted in the present case, the order of acquitted has to be upheld.

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) of offences under sections 7 and 16 of the Prevention of Food Adulteration Act by the Second Presidency Magistrate, G.T., Madras, in M.P. No. 533 of 1963 on his file.

T. A. Ramaswami Reddy, for Appellant.

A. Krishna Rao, for Respondent.

K. A. Panchapakesan, for the Public Prosecutor on behalf of State.

The Court delivered the following

JUDGMENT.—This appeal is against the acquittal of the respondent by the Second Presidency Magistrate, Georgetown.

On 18th March, 1963, at 7-10 A.M., P.W. 1, Elumalai, the Food Inspector attached to the Corporation of Madras, purchased three ollocks of milk from the respondent near the Beach Railway Station. A third part of this milk, sent to the Public Analyst, properly sealed and secured, was found, on analysis, to have been adulterated with 44 per cent of added water, as it contained only 3.1 per cent as against 3.5 per cent of the required milk fat and had only 4.8 per cent milk solids other than milk fat, as against the required quantum of 8.5 per cent. The milk was in fact a mixture of cows' and buffaloes' milk. The Analyst based the aforesaid opinion on items A-11.01.01 and A-11.01.02—in Appendix-B to the Prevention of Food Adulteration Rules which prescribed that cows' milk and buffaloes' milk shall contain at least 8.5 per cent and 9.0 per cent of milk solids other than milk

* Cr.A. No. 934 of 1963. 23rd April, 1965.

fat. When prosecuted for an offence punishable under sections 7 and 16 of the Prevention of Food Adulteration Act, the plea of the respondent was that he did not voluntarily sell the sample of the milk to P.W. 1, the Food Inspector, that the notice Exhibit P-2 was not read or explained to him, and that the milk belonged to one Kothanda Pillai and the respondent did not know that it was adulterated. This was an untenable plea, but the respondent examined one Selvaraj, an attestor to Exhibit P-2 who was not prepared to state that he was present when P.W. 1 purchased the sample of milk from the respondent. The learned Presidency Magistrate disposed of the case with an acquittal order on the short question that since under section 10 (7) of the Prevention of Food Adulteration Act, P.W. 1 was bound as far as possible to call not less than two persons to be present at the time when he purchased the sample and since P.W. 1 was present only when the Food Inspector was filling the bottles and sealing them, it could not be said that the requirements of section 10 (7) of the Act had been complied with in the case and for this reason the respondent was entitled to an acquittal. In coming to this conclusion, the learned Presidency Magistrate also relied on the observations of Somasundaram, J. in In re, *Raja Konar* alias *Swaminatha Konar*[1]. In this case, the learned Judge has explained the expression 'as far as possible' in section 10 (7). The expression is intended to obviate the necessity of the presence of two persons and securing their signatures, if the circumstances under which he takes the sample were such that there could not possibly be two persons present at the time. It does not mean that when two persons are available, the Food Inspector can dispense with them and take protection under the expression 'as far as possible'. The learned Judge further observed that the provision is intended as a safeguard to the accused because a severe punishment is sought to be inflicted for a second offence and the more severe the punishment, the greater must be the care shown in observing the procedure laid down in the statute.

The present, however, was not a case where witnesses had not been requisitioned. It was a case, where, if at all, the attesting witnesses have not fully supported the prosecution case, and, therefore, the question was one of appreciation of their evidence in the light of the evidence of the Food Inspector and not a case for the application of the rule in In re *Raju Konar* alias *Swaminatha Konar*[1]. If the Rules rested there, I should have been slow to uphold the acquittal order in this case. But I find on a perusal of the records of the case that all the tests necessary to find out the milk to be adulterated have not been gone through, in this case. In *Public Prosecutor* v. *Kallur Rayavaram Co-operative Milk Supply Society Ltd.*[2], Kailasam, J., has held on a discussion of the relevant authorities that freezing point test is the fair and safe method of determining added water in milk. The sample milk in the case before the learned Judge was found, on analysis, to contain 7 per cent fat, 6 per cent solids-not fat and freezing point (Rortvet) O. 495. C. whereas genuine milk has a freezing point of O.535.C., though it varies from O.510 to O.560 with a mean of O.530. The learned Judge, therefore, found the milk to be adulterated with 7 per cent of added water. In the course of his judgment, he referred to certain text books on the subject and accepted with approval the view that it is inadvisable to certify a milk as containing extraneous or added water merely on the basis of a low N.F.S. figure and has emphasised that confirmation should be sought from the freezing point which is gradually being accepted in Courts as a reliable test.

In the case on hand, the above test has not been applied which, as I gather from the authorities, is a more conclusive and decisive test. Since that test has not been attempted in the present case, the argument that the Analyst's Report is conclusive on the facts therein, does not take us very far. In the circumstances, I see no reason to interfere with the order of acquittal in this case.

This appeal is, therefore, dismissed.

V.S. — *Appeal dismissed.*

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1. (1958) 2 M.L.J. 194: (1958) M.L.J. (Crl.) 697.
2. (1964) 2 M.L.J. 53: (1964) M.L.J. (Crl.) 411.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Sundaraperumal .. *Appellant**

v.

Badrinarayanan *alias* Badrachalam and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 66 (1)—Benami purchase in Court auction—Prohibition under—If would apply to joint Hindu family transactions.

Where a suit is filed by a member of a Hindu undivided family for partition of a property on the basis that it was purchased in the name of one member for the family out of family funds the suit will not come within the letter of the prohibition under section 66 (1) of the Code of Civil Procedure. Further the object of the section being to check the practice of making benami purchase in execution sales, it cannot be taken to affect the rights of members of a joint Hindu family, who by operation of law, and not by virtue of any private agreement, are entitled to treat as part of their common property an acquisition, however made, by one member of the family in his own name, if made by the use of the family funds.

Appeal against the decree of the Court of the Subordinate Judge of Salem in Appeal Suit No. 46 of 1962, preferred against the decree of the Court of the District Munsif of Salem in Original Suit No. 4 of 1959.

D. Ramaswami Ayyangar and *S. Ramanathan*, for Appellant.

R. Gopalaswami Ayyangar and *S. Desikan*, for Respondents.

The Court delivered the following

JUDGMENT.—The first defendant in a suit for partition is the appellant in this Court. The suit was instituted by the father and defendants 1 to 5 are his sons. The dispute relates to only one item of property, namely, item 2. This item of property was purchased in Court auction in execution of the decree in O.S. No. 334 of 1936 on the file of the District Munsif's Court, Salem. Exhibit B-1 is the sale certificate. The finding of the Courts below is that the fund for this purchase was provided by the plaintiff. In fact the learned Subordinate Judge observes that he has no doubt at all that the plaintiff alone as manager of the joint family advanced money for the purchase of the second item in Court auction. To the same effect is the finding of the trial Court. There is also ample and substantial evidence on record to show that ever since its purchase the property has been held and enjoyed as the property of the joint family of which the plaintiff was the manager and defendants 1 to 5, the junior members. There is evidence that other items of joint family properties was mortgaged to discharge and pay off to a certain extent the mortgage over this second item, which was subsisting when the Court auction purchase was made. In the face of this evidence Mr. D. Ramaswami Ayyangar, learned Counsel for the appellant, finds it difficult to dislodge the finding of the Courts below that the purchase was out of joint family funds, or, at any rate, that the property has been treated as the property of the joint family.

However, learned Counsel contends that on the very allegations in the plaint the suit is barred under section 66 of the Code of Civil Procedure. Learned Counsel draws my attention to the pleading in the plaint, where it is stated that the plaintiff purchased for a sum of Rs. 905, from out of his savings, item No. 2 in the plaint for the benefit of the joint Hindu family in the name of the first defendent in a Court sale dated 4th September, 1941 in R.E.P. No. 789 of 1939 in O.S. No. 334 of 1936, Salem District Munsif's Court, subject to the liability to discharge the balance of principal of Rs. 2,000 due under a mortgage. Learned Counsel draws my attention to the next sentence in the plaint where it is stated : "Though the property was purchased herein." It is contended that these allegations come directly under the prohibition of section 66 of the Code of Civil Procedure. Section 66 (1) runs thus :

"No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some one through whom the plaintiff claims."

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* Second Appeal No. 252 of 1963. 26th March, 1965.

But it must be noticed that the plaintiff in this case does not contend that the purchase was made on his own behalf. The purchase is for the family of which the purchaser is a member. So strictly interpreted according to the letter, section 66, Civil Procedure Code has no application. The learned Counsel would however point out that it is not asserted in the plaint that the plaintiff had other joint family funds and the purchase was made with those joint family funds. It is pointed out that there is no reference to any joint family nucleus which has contributed for the purchase of item 2, so that at the outset itself the source of purchase money was from joint family funds. It is also pointed out that the plaintiff has stated that the first defendant has no interest in the property. In my view, this is not a proper reading of the plaint; no doubt loose language has been used but the gist of the plaint is that the purchase was for the benefit of the joint family in the name of a member of the family. At any rate, the subsequent paragraphs in the plaint show that this property has been treated as property of the joint family by all the members of the family and thus brought into the hotchpot and made joint family property available for division at a partition of the joint family properties.

Of course, learned Counsel does not contend that if the purchase is for the joint family from joint family funds, it would be hit by section 66 of the Code of Civil Procedure. If authority is required that section 66 of the Code of Civil Procedure would not hit such a purchase, there is the decision of the Privy Council in *Bodh Singh Doodhooria* v. *Gunesh Chunder Sen*[1] where at page 329 their Lordships of the Judicial Committee observed :

"They (provisions of old section 260 of the Code of 1859) were designed to check the practice of making what are known as benami purchases at execution sales, *i.e.*, transaction in which *A* secretly purchases on his own account in the name of *B*. Their Lordships think that they cannot be taken to affect the rights of members of a joint Hindu family, who by the operation of law, and not by virtue of any private agreement, or understanding, are entitled to treat as part of their common property an acquisition, however made, by a member of the family in his sole name, if made by the use of the family funds."

Learned Counsel would no doubt strenuously contend that on the plaint allegations the purchase in this case has not been out of family funds, as the plaintiff has not stated so in the plaint. But learned Counsel for the respondents points out that even prior to the acquisition of this property, the joint family had other properties. The evidence is that the plaintiff was carrying on the profession of weaver from his early childhood and that all the members were living in item 1 of the suit properties which, according to the plaintiff, was property of the joint family. The learned Subordinate Judge also gives a finding that the property has been treated as the property of the joint family. He finds that in the circumstances he prefers the evidence of the plaintiff's witnesses to that of the defendants' witnesses, and accepts the case of the plaintiff that he had been in possession and enjoyment of the said item 2 all along since the date of Exhibit B-1 on behalf of the joint family. It may be pointed out that wherever in the plaint the plaintiff asserts title and denies the title in the first defendant, it is a denial of the first defendant's title in his individual capacity. He never denied the title of the first defendant as a member of the joint family. In the circumstances, I find no cause for holding that the claim of the plaintiff in regard to item 2 is barred by the provisions of section 66 of the Code of Civil Procedure.

In the result, the Second Appeal fails and is dismissed. As the rather loose language in the plaint has given room for some arguments in this Second Appeal, the parties will bear their own costs in this Court.

No Leave.

R.M. *Appeal dismissed.*

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1. 12 B.L.R. 317.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT:—MR. JUSTICE K. VEERASWAMI.

M. Ramaswami Asari .. *Petitioner**

v.

The State of Madras represented by the Secretary to Government, Home Department, Madras-9 and another .. *Respondents.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 29—Power of exemption under—Scope of.

The power of the Government under section 29 of the Madras Buildings (Lease and Rent Control) Act is a very wide one and its exercise is not controlled by any other provision in the Act. Its purpose is to soften the rigour or hardship in the working of the Act, which is an emergency legislation, and the power may properly and justifiably be used for that purpose. However as the power is in the nature of an exception to the general protection under the Act, its exercise may call for scrutiny in each case to find out whether the purpose exists or not.

Where a building was let (for non-residential purpose) during the minority of the owner and the owner on attaining majority required the same for his own residence as he had no other residence of his own and sought exemption of the building from section 10 of the Act as there was no remedy open to him under the Act for eviction of the tenant it will be a legitimate case where the Government could exercise its power under section 29 of the Act.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records pertaining to G.O. No. 1136, Home, dated 16th April, 1964 and to quash the proceedings contained therein.

S. Rajaram Iyer and *R. S. Venkatachari*, for Petitioner.

K. Venkataswami for the Additional Government Pleader, on behalf of 1st Respondent.

R. Gopalaswami Iyengar, for 2nd Respondent.

The Court made the following

ORDER.—This petition by a tenant is to quash an order of the 1st respondent dated 16th April, 1964, and made under section 29 of the Madras Buildings (Lease and Rent Control) Act, 1960, exempting premises No. 128, South Avani Moola Street, Madurai, from the provisions of section 10 of the Act. The petitioner has been in occupation of the premises since June, 1952. There is no dispute that the premises belong to the 2nd respondent. At the time the premises were let out to the petitioner, the 2nd respondent was a minor. On his attainment of the age of majority and his marriage, he applied to the Government for exemption on the ground that he had no other house of his own at Madurai and was actually residing in a rented premises. After asking for the explanation of the petitioner, the Government made the impugned order being satisfied that this is a case which justified grant of exemption.

Mr. Rajarama Ayyar for the petitioner contends that the Government in making the order was misled by its view that the premises were both residential and non-residential and that in such a case no remedy was open to the petitioner under the provisions of the Act. Learned Counsel relies on *Dakshinamoorthy* v. *Thulja Bai*[1] and contends that where it is not shown that the purpose of the tenancy is predominantly for one or other purpose a petition for eviction would lie in any event. The penultimate paragraph of that judgment no doubt supports the contention. There is no finding by the Government in the instant case as to the predominant purpose of the tenancy.

But, in my view, that does not in any way vitiate the impugned order. The power of the Government under section 29 of the Act is a very wide power and its exercise is not controlled by any other provision in the Act, as will be apparent from

* W.P. No. 1544 of 1964. 16th April, 1965.

1. (1952) 1 M.L.J. 390 : I.L.R. (1952) Mad. 651.

the opening words of the section. The purpose of this power is to soften the rigour or hardship in the working of the Act which is an emergency legislation. It follows, therefore, that the power may properly and justly be used for that purpose. Whether that purpose exists or not will be a matter for decision in each case in the light of the particular facts. An exemption being in the very nature an exception to the general protection provided under the Act, it may *prima facie* be discriminatory and, therefore, each order under section 29 of the Act may call for examination. *Ex facie* the order therefore it must appear that it has been made for justifiable purposes. Summing up the nature of the power, this Court in *Pannalal Jagannath Prasad Gupta* v. *State of Madras*[1] observed :

"It should therefore be taken as well settled that *bona fide* requirements by landlord of a non-residential building for his own occupation is a ground well within the scope of section 13 of the Act and that, in particular circumstances, if the Government are satisfied that the justice of the case, including relieving hardship or unreasonable severity or rigour in the application of the provisions of the Act, requires it, they may legitimately and properly grant exemption on that ground."

I continue to hold the same view. *Jagannath Prasad Gupta* v. *State of Madras*[2] has also concurred with it.

In this case, the facts undoubtedly justify the order. Here is the 2nd respondent who became of age, got married, but was living in a rented house, owning no other house himself in Madurai and naturally he wanted to occupy his own house. That is certainly a legitimate purpose for which the Government could exercise its power under section 29 of the Act and relieve the hardship of the 2nd respondent. That is what the Government did.

The petition fails and is dismissed with costs. Counsel's fee Rs. 100.

R.M. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

K. Nallathambi .. *Petitioner**

v.

Nagarathnaswamy Devasthanam by its Managing Trustee, Annavasal, Mannargudi Taluk, Thanjavur District .. *Respondent.*

Madras Cultivating Tenants' Protection Act (XXV of 1955), section 3—Application for eviction—Revenue Court's jurisdiction to direct tenant to pay arrears of rent for a period exceeding three years—No limitation under the Act.

The Limitation Act does not provide for any period for an application for eviction by the landlord under the Cultivating Tenants' Protection Act. In the absence of any provision in the Tenants' Protection Act restricting the arrears of rent to three years prior to the date of application for eviction and as the Act imposes a restriction on the landlords right to resort to Civil Court the Revenue Court has jurisdiction to direct the tenant to pay arrears of rent for a period exceeding three years.

Petition under section 6 (*b*) of the Madras Cultivating Tenants' Protection Act, 1955, read with section 115 of Act V of 1908, praying the High Court to revise the order of the Revenue Court, Thanjavur, dated 2nd May, 1961 and made in R.P. No. 1203 of 1960.

M. R. Krishnan, for Petitioner.

T. R. Mani for *S. Singaravadivel*, for Respondent.

The Court made the following

ORDER.—This Civil Revision Petition raises a question of some importance. The respondent-landlord filed a petition under section 3 (4) (*a*) for evicting the petitioner. He alleged that the petitioner was in arrears of rent for faslis 1363, 1364, 1365, 1366 and 1367. The Revenue Court found that the petitioner was in arrears for faslis 1363 to 1367 in a total sum of Rs. 1,384.68. Giving credit to a sum of Rs. 551.24 already paid by the petitioner, the Revenue Court directed the petitioner to pay the balance of Rs. 833.44.

1. (1961) 74 L.W. 604. 2. (1963) 1 M.L.J. 415.

* C. R. P. No. 2329 of 1961. 13th July, 1964.

Learned Counsel for the petitioner submitted that the revenue Court is not entitled to direct the payment of arrears of rent which fell due three years before the date of application. It was contended that the landlord cannot in a civil suit obtain a decree for arrears of rent which were due for more than three years prior to the date of the suit, as any such claim would be barred under the Limitation Act.

The Cultivating Tenants' Protection Act confers on the cultivating tenant a right to continue in possession and no cultivating tenant shall be evicted from his holding during the continuance of the Act at the instance of the landlord except under the provisions of this Act. Section 3 (2) (*aa*) provides that sub-section (1) of section 3 shall not apply to a cultivating tenant, who, if in arrears at the commencement of the Act with respect to the rent payable to the landlord and accrued due subsequent to 31st March, 1954, does not pay such rent within a month after such commencement, or, who, in respect of rent payable to the landlord after such commencement, does not pay such rent within a month after such rent became due. If a cultivating tenant commits default in payment of rent, the remedy of the landlord is by way of application under section 3 (4) (*a*) for eviction of the tenant. On a petition by the landlord for eviction, the Revenue Divisional Officer shall give a reasonable opportunity to the landlord and the tenant to make their representations hold a summary enquiry into the matter and may pass an order allowing the application, giving the cultivating tenant such time as he considers just and reasonable for depositing the arrears of rent payable under this Act. Section 3 does not prescribe the period for any limitation for the landlord filing a petition for eviction under section 3 (4) (*a*) of the Act. The Act also does not specify that in an application by the landlord for eviction of a tenant for arrears of rent, the Revenue Court can only restrict the arrears to three years' of rent. The Act imposes a restriction on the rights of the landlord in resorting to civil Courts, but in cases of default of payment of rent, the remedy is provided for by way of application for eviction of the tenant. In the absence of any provision restricting the arrears of rent to three years prior to the date of the application, I do not see any justification for holding that the arrears of rent shall be confined only to three years' rent prior to the date of application. The Limitation Act does not provide for any period for an application for eviction by the landlord under the Cultivating Tenants Protection Act. In the circumstances, I am unable to say that the order of the Revenue Court directing the petitioner to pay the arrears of rent for five faslis prior to the date of application is erroneous.

This petition is dismissed with costs.

K.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA AYYAR, *Chief Justice* AND MR. JUSTICE T. VENKATADRI.

A. Janaki .. *Appellant**

v.

Annapalam Ammal and another .. *Respondents.*

Will—Grant of probate—Long delay in applying for—Effect—Genuineness of will—Onus of proof.

It is true that an application for probate can be made at any time. There is no limitation of time for making such an application. Mere delay itself cannot be a ground against the genuineness of the will. But still the Court is bound to be satisfied with regard to the genuineness of the will that is set up. The burden of proving due execution is upon the person propounding the will. He must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. It is usual to demand an explanation when there is unreasonable delay in applying for probate. Such explanation is necessary to assist the Judge in coming to a finding as to the genuineness of the will propounded.

In the instant case the alleged will is an unregistered one. The testator lived only for five days after the execution of the will. There is no proof of his mental capacity. The will was executed in the

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* L.P.A. No. 95 of 1963. 17th August, 1964.

house of the propounder and a major portion of the estate is bequeathed to him and his brothers. There is considerable delay of 36 years in coming to the Court for the probate of the will. Its execution is doubtful, the conduct of the parties is not in favour of the existence of the will, the disposal of the properties is unnatural and the attendant circumstances are all of a suspicious nature. In these circumstances the propounder who applied for the probate has to explain the reasons for the delay in coming to the Court and prove due execution of the will to the satisfaction of the Court. He has not done so and is therefore not entitled to the grant of probate of the will.

Appeal under clause 15 of the Letters Patent against the Judgment and Decree of Jagadisan, J., dated 3rd May, 1961 and passed in Appeal No. 112 of 1958—Appeal preferred to the High Court against the Decree of the District Court, Tirunelveli, dated 19th February, 1958, in Original Suit No. I of 1957.

H. Devadoss and *J. Samuel*, for Appellant.

V. V. Raghavan and *T. Martin*, for Respondents.

The Judgment of the Court was delivered by

Venkatadri, J.—This is a Letters Patent Appeal from the judgment of Jagadisan J., by which he pronounced against the will of one Amirthanayaga Nadar, propounded by the plaintiff A. Jacob.

The will that is propounded is dated 24th June, 1921 and Amirthanayaga Nadar, the testator, died on 30th June, 1921. The will is said to have been in possession of the plaintiff during the period of 36 years following the death of the testator and it was only in the year 1957 that he filed a petition requesting the Court for leave to prove the will in common form and praying for the grant of a probate to him. From a mere narration of the above dates and facts, it will be a matter for surprise why the will was not brought to light for such a long time till the plaintiff filed the present suit on 18th July, 1957. Under the will the testator bequeathed the money-lending business, major portion of the immovable properties, house, cattle, etc., to his children including the plaintiff, born to his first wife. To the first defendant, who was married to the testator a year prior to his death, was given a small extent of land 1.96 acres in extent out of an estate of 33 acres and provision was made for payment of a sum of Rs. 500 to the daughter of the first defendant for marriage expenses. The testator also directed his son, the plaintiff, to construct a small mud house for the first defendant.

The first defendant disputes the genuineness of the will and states that her husband died intestate, that the plaintiff himself allowed other members of the family to deal with the properties as if there was no will, that there was an oral partition in 1924, in and by which the defendants were allotted separate properties and the members of the family have acted on this oral partition by entering into possession of the respective properties allotted to them, changing the pattas into their names and dealing with their properties and that the will was not brought to light during all these years till the suit was filed.

On these pleadings, the parties went to trial and the Additional District Judge finding that the will was true, valid and binding on the defendants decreed the suit and directed the issue of probate to the plaintiff. But on appeal to this Court by the defendants, Jagadisan, J., set aside the order of the lower Court and dismissed the suit holding that there was no acceptable proof that Exhibit A-1 was a genuine and a valid will of the late Amirthanayagam and that it was not proper that probate should be granted to the plaintiff.

It is against this judgment dismissing the suit that the present appeal is preferred and once again it is contended that the will is true and genuine and that probate should be granted to the plaintiff, notwithstanding the considerable delay of 36 years in coming to the Court.

It is true that an application for probate can be made at any time. There is no limitation of time for making such an application. Mere delay itself cannot be a ground against the genuineness of the will. Probate involves payment of a large sum by way of probate duty and delay might be due to lack of funds. But still the Court is bound to be satisfied with regard to the genuineness of the will that is set up. The burden of proving due execution is upon the person propounding

the will. He must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator.

What is the evidence that has been given in the instant case? The plaintiff says that his father executed a will on 24th June, 1921. Though there was a delay of thirty-six years in filing a suit for grant of probate, the will was referred to as early as in 1922, when he executed a usufructuary mortgage. But under this document he mortgaged the properties that were allotted to the first defendant according to the terms of the will. The first defendant also mortgaged certain items of properties under Exhibit B-3 on 19th April, 1941. The document recites that there was an oral partition and the mortgaged properties were allotted to her. Subsequently she sold the properties to the mortgagee himself and the plaintiff's brother purchased the same from the mortgagee later. These items of properties are not, however, found to be allotted to the first defendant under the terms of the will now propounded by the plaintiff. The plaintiff also relied on the document Exhibit A-2, which is a release deed said to have been executed by the defendants at the time of receipt of the sum of Rs. 500 for the marriage expenses of the testator's daughter (second defendant). But this document was disputed by the defendants and it was found to be inadmissible for want of registration. The first defendant also produced joint patta issued to her along with the plaintiff and his brothers in respect of some items of properties which are not bequeathed to her under the terms of the will. The will is an unregistered one. The testator lived for five days after the execution of the will. There is no proof of his mental capacity. There is considerable delay in coming to the Court for probate of the will. Its execution is doubtful, the disposal of the properties is unnatural and the attendant circumstances are all of a suspicious nature. In these circumstances the plaintiff has to explain the reason for the delay in coming to the Court and prove execution of the will to the satisfaction of the Court. As observed by Muttuswami Ayyar, J., in *Gnanamuthu Upadesi* v. *Vana Koilpillai Nadan*[1]:

> "It is no doubt usual to demand an explanation when thee is unreasonable delayin applying for probate, because the time when after the testator's death the will is to be proved is not fixed, and the explanation is necessary to assist the Judge in coming to a finding as to the genuineness of the will propounded."

In *Chandrika Bakhsh* v. *Madho*[2], the genuineness of the will was questioned for the first time after a period of twenty-five years after its execution. In that case—

> "The will was produced at once, it was not kept quiet; it was produced within a very short time for the practical purpose of having mutation made of names in the register............"

On those facts, it was held that the will was genuine and was sufficiently proved.

The test to be applied in such cases is laid down thus by Kumaraswami Sastri, J. in *Ganshamdoss* v. *Saraswathi Bai*[3]:

> "One important test, in cases where wills are disputed and disputes arise several years later, is to see what was the conduct of the parties and where the conduct of the parties can only be rationally explained, by the fact of the existence of a will, I think this fact will have considerable bearing, in appreciating the evidence of the witnesses as to its genuineness."

In the present case, the conduct of the parties is not in favour of the existence of the will. The plaintiff mortgaged some items of properties which were allotted to the first defendant. The first defendant on her part also mortgaged some items of properties not allotted to her under the will and the plaintiff acquiesced in such conduct. Really if there was a will neither the plaintiff nor his step-mother (first defendant) would have dealt with the properties in the manner they did.

In *Mt. Biro* v. *Atma Ram*[4], Sir Shadi Lal described the will which was produced in that case twenty-two years after its execution as an *inofficious document* in view of the strange provisions and the niggardly manner in which the daughter, who should have been the proper object of her father's bounty, was treated. It was held that the testament was unnatural and ran counter to the ordinary sentiment of persons having status and that there were circumstances telling against the genuineness

1. (1894) I.L.R. 17 Mad. 379, 381.
2. A.I.R. 1924 P.C. 231.
3. A.I.R. 1925 Mad. 861, 868.
4. (1937) 1 M.L.J. 646 : L.R. 64 I.A. 92.

of the will and the failure of the widow to mention the will on critical occasions warranted the conclusion that the will was not made by the testator. In the same way in the instant case under the will alleged to have been executed by the plaintiff's father only a small extent of property, *viz.*, 1.96 acres of land out of 33 acres was bequeathed to the junior widow first defendant, who married the testator just a year before his death, and only a small sum of Rs. 500 was provided for the marriage expenses of the first defendant's daughter. Under the Indian Succession Act the junior widow is entitled to one-third of the estate and her daughter along with the children of the senior widow are entitled to two-thirds of the estate. There is no evidence to show that there were misunderstandings or quarrel between the testator and his second wife at the time of his death. As a matter of fact the testator was in the first defendant's parents' house till some time prior to his death and when he became seriously ill he was removed to the plaintiff's house. The alleged will was executed in his house and the major portion of the estate was bequeathed to him and his brothers. He is now propounder of the will.

In *Vellaswamy Servai* v. *Sivaraman Servai*[1], the propounder of the will was the principal beneficiary and had taken a leading part in giving instructions for execution of the will and procuring its registration. Sir Binod Mitter observed at page 185 :

> " Circumstances exist in this case that would excite the suspicion of any probate Court and require it to examine the evidence in support of the will with great vigilance and scrutiny and the respondent is not entitled to probate unless the evidence removes such suspicion and clearly proves that the testator approved of the will."

Lindley, L. J., said in *Tyrrell* v. *Painton*[2] ;

> "The wide definition of suspicion extends to all cases in which circumstances exist which excite the suspicion of the Court in reference to the preparation of the will, its intrinsic terms and circumstances surrounding its preparation and execution."

Similarly in *Harimati Debi* v. *Anath Nath*[3] a Bench of the Calcutta High Court while dealing with an application for issue of letters of administration with the will annexed made more than twenty years after the testator's death made the following observations at page 539, which are relevant for the purpose of this case :

> "I desire only to point out that the burden of proving the will in solemn form is cast upon the propounders, and in view of the fact that an unregistered will is sought to be propounded after the lapse of more than 20 years, it is required that all manner of doubt and suspicion which are likely to arise should be removed by them. Having regard to the unsatisfactory nature of the evidence that has been adduced and the discrepancies in them they are bound to excite the suspicion of any probate Court, and unless such suspicions are removed, no probate can be granted."

The principles which govern the proof of a will have been laid down by the Supreme Court from time to time. See : *H. Venkatachala Iyengar* v. *B. N. Thimmajamma and others*[4]; and *Rani Purnima Devi* v. *Kumar Khagendra Narayan Dev*[5]: The above two decisions have been followed in a recent decision of the Supreme Court in *Shashi Kumar* v. *Subodh Kumar*[6] where Wanchoo, J., observed thus at page 531 :

> "The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by section 63 of the Indian Succession Act. The onus of proving the will is in the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator allege undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural, improbable or unfair in the light of relevant circumstances or there might be other indications in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him that is also a circum-

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1. (1929) 58 M.L.J. 114 : L.R. 57 I.A. 96 : I.L.R. 8 Rang. 179, (185) (P.C.).
2. L.R. (1894) Prob. 151.
3. A.I.R. 1939 Cal. 535, (539).
4. (1959) S.C.J. 507 : (1959) 1 S.C.R. 426. (Suppl.).
5. (1962) 1 S.C.J. 231 : (1962) 3 S.C.R. 195.
6. A.I.R. 1964 S.C. 529.

stance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations."

In the circumstances of the present case, the plaintiff has not removed our doubt and suspicion and convinced us that the will is a genuine document and is, therefore, not entitled to the grant of probate of the will.

The appeal, is, therefore, dismissed with costs.

V.K. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

E. K. Hasheeb & Co. .. *Petitioner* *

v.

The State of Madras represented by the Deputy Commissioner of Commercial Taxes, Madras Division .. *Respondent.*

Madras General Sales Tax Act (*I of* 1959), *sections* 16 *and* 32—*Respective scope—Powers under not mutually exclusive.*

The power of revision under section 32 of the Madras General Sales Tax Act (I of 1959) can be exercised by the Deputy Commissioner to correct errors committed by the assessing authority in his order of assessment, irrespective of the question as to whether the said errors could also be corrected by the assessing authority himself under section 16 of the Madras General Sales Tax Act (I of 1959). The power under section 32 is a distinct and separate power and its exercise cannot be controlled by any power which may inhere in the assessing authority under section 16. The provisions of section 16 and 32 are not mutually exclusive as to preclude a case falling under section 16 being dealt with under section 32.

If the argument that in a case to which section 16 applies the powers of revision under section 32 cannot be invoked should be accepted then it would be impossible to conceive of any case to which section 32 would be attracted. Such a view would be opposed to the well-settled rule of construction that there should be a harmonious reading of all the provisions of the statute as a whole and no provision should be rendered as serving no purpose. Section 16 should not therefore be construed as in any way delimiting or curtailing the powers of revision conferred under section 32.

Whether or not a return is submitted by an assessee, if the assessing authority applies his mind to the business dealing and transactions of the assessee and excludes certain items in the assessable turnover on an erroneous view of the law that they are exempt from taxation, the revising authority will have undoubted jurisdiction to correct the error by the exercise of its powers of revision under section 32.

Petition under section 38 of the Madras General Sales Tax Act praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 31st July, 1962 and made in Tax Appeal No. 820 of 1961, preferred against the order of the Deputy Commissioner of Commercial Taxes, Madras Division, relating to the assessment year 1954-55 in his Rc. No. 11519/61 A-6 (S.M.R. 14/61-62), dated 16th June, 1961 (Assessment order, dated 22nd October, 1959, of the Assistant Commercial Tax Officer III, Madras City in A. 5/522/54-55 and A-879/54-55).

T. T. Srinivasan, for Petitioners.

G. Ramanujam, for Government Pleader (*A. Alagiriswami*), for Respondent.

The Order of the Court was made by

Ramamurti, J.—The main point that arises for determination in this Revision Petition is whether the assessment made by the assessing authority on 22nd October, 1959, could be modified only by the very assessing authority under section 16 of the Madras General Sales Tax Act of 1959 (hereinafter called the Act) on the basis of an escaped turnover or whether the Deputy Commissioner is entitled to exercise his powers of revision under section 32 of the Act, on the basis that the order of the initial assessing authority is vitiated by errors of fact or law as *escaped assessment.*

The petitioners are dealers in hides and skins and the dispute relates to the assessment of their dealings for the assessment year 1954-55. By his order, dated,

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*T.C. No. 45 of 1963. 19th August, 1964.

22nd October, 1959, the Assistant Commercial Tax Officer III, Madras City, determined the net turnover of the petitioners at about Rs. 12,866-7-7, after holding that as the petitioners are unlicensed dealers, the turnover relating to the purchase value of untanned hides and skins and the sale value of tanned goods should not be taken into account in view of the Bench decision of the Madras High Court in *Noor Mohammed & Co.* v. *State of Madras*[1]. The said decision of the Madras High Court, however, was reversed by the Supreme Court in *State of Madras* v. *M. A. Noor Mohammed & Co.*[2] with the result that even in the case of an unlicensed dealer his turnover relating to the purchase value of untanned hides and skins and the sale value of the tanned goods must be taken into account.

In view of this pronouncement of the Supreme Court in *State of Madras* v. *M. A. Noor Mohammad & Co.*[2] the Deputy Commissioner of Commercial Taxes, Madras, after following the necessary procedure and after issuing notice to the assessee revised the assessment of the assessing authority. He fixed the assessable net turnover at Rs. 4,87,826-10-10.

As per the rules in force during the year 1954-55, the assessment had to be completed within a period of three years, *i.e.*, for 1954-55, before the expiry of 31st March, 1958. But before this period of three years had run out, the rule was amended by a notification, dated 30th March, 1957, published in the *Fort St. George Gazette* on 1st April, 1957 extending the period to five years so that for the year 1954-55 the time-limit would be 1st April, 1960. The assessment made on 22nd October, 1959, was therefore well within time.

At the time of the assessment, the Madras General Sales Tax Act, Madras Act I of 1959, had come into force and the assessment proceedings were therefore rightly taken under this Act. A contention was faintly raised by the learned Counsel for the petitioners about the applicability of the provisions of Act I of 1959, as well as about the scope of the repeal of the Madras General Sales Tax Act of 1939 by Madras Act I of 1959, but in view of the provisions of section 61 of the Act of 1959, as well as the provisions of the amendment Act of 1963 (Madras Act X of 1963) learned Counsel did not persist in this argument.

In the course of his arguments he confined himself to the main point that this is a case to which section 16 of the Act alone would apply under which the assessment can be varied or modified by the original assessing authority alone, on the ground of an escaped turnover, and that the Deputy Commissioner cannot exercise his powers of revision under section 32 of the Act. He urged that the Full Bench decision of the Madras High Court in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[3] is no longer good law by reason of two judgments of the Supreme Court, in *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar*[4], a decision rendered under the Bihar Agricultural Income-tax Act of 1938 and the other in *Maharajkumar* v. *I.T. Commissioner*[5] arising under section 34 of the Indian Income-tax Act.

Learned Counsel drew our attention to the judgment of Veeraswami, J., in Writ Petitions Nos. 345 to 348, etc., of 1960, a batch of writ petitions, and to two Bench judgments, one of Srinivasan and Venkatadri, JJ., dated 3rd April, 1963 in Tax Case No. 85 of 1962 and the other of Jagadisan and Venkatadri, JJ., in Tax Case Nos. 56 and 58 of 1963, dated 8th July, 1963, in which the effect of the judgments of the Supreme Court referred to above upon the judgment of the Full Bench in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[3] came up for consideration. In the view which we take of the facts of the instant case, we think it unnecessary to express a final opinion as to how far and to what extent, the judgment of the Full Bench in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[3] requires reconsideration in the light of the two judgments of the Supreme Court referred to above. At the same time

1. (1956) 2 M.L.J. 374 : (1956) 7 S.T.C. 792.
2. (1961) 1 S.C.J. 301 : (1961) 1 S.C.R. 148 : (1961) 1 M.L.J. (S.C.) 51 : (1961) 1 An.W.R. (S.C.) 51.
3. (1956) 2 M.L.J. 327 : I.L.R. (1956) Mad. 1285 (F.B.).
4. (1960) S.C.J. 145 : (1960) 1 S.C.R. 332.
5. (1959) S.C.J. 230 : (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An.W.R. (S.C.) 92.

we are of opinion that in view of the judgment of the Supreme Court in *State of Kerala* v. *M. Appukutty*[1] reversing the judgment of the Kerala High Court in *Appukkotty* v. *State of Kerala*[2] a case which arose under the Madras General Sales Tax Act (IX of 1939), and the Madras General Sales Tax Rules of 1939, rule 17 (1), and the judgment of the Supreme Court in *Ghanshyamdas* v. *Regional Asst. Commr., Sales Tax*[3], a case arising under the C.P. and Berar Sales Tax Act (XXI of 1947), many of the observations contained in the judgment of the Full Bench in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[4] may require reconsideration.

In order to appreciate the scope of the arguments advanced by learned Counsel, it is first necessary to refer briefly to the provisions of the Madras General Sales Tax Act, 1939 and the Rules framed thereunder, as well as the Madras General Sales Tax Act, 1959 and the Rules. Section 9 of the Act of 1939 provides the procedure for making assessments *i.e.*, filing of returns within the specified time, and assessments including assessments by best judgment under certain contingencies. Section 11 gives the right of appeal to the aggrieved party (assessee) to the prescribed authority. Then there is the further right of appeal to the Appellate Tribunal. Section 12 confers certain powers of revision upon certain authorities above the rank of the assessing authority and this power of revision can be exercised either on an application or *suo motu*. This power of revision includes the power to call for and examine the record of any order passed or proceeding recorded by the assessing authority which is subordinate to the authority exercising the powers of revision and the revisional authority is entitled to exercise the power of revision for the purpose of satisfying itself as to the legality or propriety of such an order or as to the regularity of such proceeding and passing such order with respect thereto as it may think fit. Section 19 confers the power upon the Government to make the necessary Rules for carrying out the purposes of the Act. Two sets of Rules were framed: (i) the Madras General Sales Tax (Turnover and Assessment) Rules, 1939 ; and (ii) the Madras General Sales Tax Rules, 1939 (with which we are now concerned) containing provisions relating to licences, rebates accounts and procedure for appeals and revisions. Rule 17 (1) of the Madras General Sales Tax Rules, 1939 which is material runs as follows :

"17. (1) If for any reason the whole or any part of the *turnover* of business of a dealer or licensee *has escaped assessment* to the tax in any year or if the licence fee has escaped levy in any year, the assessing authority or licensing authority, as the case may be, subject to the provisions in sub-rule (1-A) may at any time within three years next succeeding that to which the tax or licence fee relates, determine to the best of his judgment the turnover which has escaped assessment and assess the tax payable on such turnover or levy the licence fee, after issuing a notice to the dealer or licensee and after making such enquiry as he considers necessary."

This rule was amended in 1957 enlarging the time-limit from three to five years. Rule 14 (2) dealing with the powers of revision ran as follows :

"The Commercial Tax Officer may, in his discretion, at any time, either *suo motu* or on an application, call for and examine the record of any order passed or any proceedings recorded under the Act by an Assistant or Deputy Commercial Tax Officer working under him, for the purpose of satisfying himself as to the legality or propriety of such order or as to the regularity of such proceedings and may pass such order in reference as he thinks fit."

The Act of 1959 while repealing the earlier Act and the Rules made thereunder has incorporated the provision corresponding to rule 17 (1) in the Act itself. Section 16 in the new Act (subject to certain changes which are not relevant to the purposes of our case) takes the place of rule 17 (1). Section 16 of the Act of 1959 reads as follows :

"*Assessment of escaped turnover*.—(1) Where, for any reason the whole or any part of the turnover of business of a dealer has escaped assessment to tax or has been assessed at a rate lower than the rate at which it is assessable, *the assessing authority* may, subject to the provisions of sub-section (2), at any time within a period of five years from the expiry of the year to which the tax relates, assess the tax payable on such turnover after service of notice on the dealer and after making such enquiry as it may consider necessary.

1. (1963) 2 S.C.J. 663 : (1963) 2 M.L.J. (S.C.) 131 : (1963) 2 An.W.R. (S.C.) 131.
2. I.L.R. (1958) Ker. 1302 (F.B.)
3. A.I.R. 1964 S.C. 766.
4. (1956) 2 M.L.J. 327 : I.L.R. (1956) Mad. 1285 (F.B.).

(2) In making an assessment under sub-section (1), the assessing authority may, if it is satisfied that the escape from assessment is due to wilful non-disclosure of assessable turnover by the dealer, direct the dealer to pay, in addition to the tax assessed under sub-section (1), a penalty not exceeding one and a half times the tax so assessed :

Provided that no penalty under sub-section (2) shall be imposed unless the dealer affected has had a reasonable opportunity of showing cause against such imposition.

(3) The powers under sub-section (1) may be exercised by the assessing authority even though the original order of assessment, if any, passed in the matter has been the subject-matter of an appeal or revision.

(4) In computing the period of limitation for assessment of the escaped turnover under this section, the time during which the proceedings for assessment remained stayed under the orders of a Civil Court or other competent authority shall be excluded. "

The power of revision (corresponding to section 12 of the 1939 Act) is contained in section 32 of the Act of 1959 which runs as follows :

" (1) The Deputy Commissioner may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority under section 12, section 14, section 15, or sub-sections (1) and (2) of section 16 and make such inquiry or cause such inquiry to be made, and subject to the provisions of this Act, may pass such order thereon as he thinks fit.

(2) The Deputy Commissioner shall not pass any order under sub-section (1) if—

(*a*) the time for appeal against the order has not expired ;

(*b*) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal, or of a revision in the High Court ; or

(*c*) more than four years have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

Section 33 also confers certain powers of revision upon the Deputy Commissioner but they are not relevant for the present enquiry.

The contention of learned Counsel for the petitioner is that the assessing authority proceeded upon the view of the law, that in the case of an unlicensed dealer his turnover relating to the purchase value of untanned hides and skins and the sale value of tanned goods could not be taken into account. The case is a clear case of an escaped turnover coming under section 16 of the present Act corresponding to rule 17 (1) referred to above. He urges that the power of an assessing authority to assess an escaped turnover under section 16 is a distinct separate power, while the power of revision under section 32 is a separate head of power altogether, and that the said two provisions, section 16 and section 32, are mutually exclusive and will have only independent operation, and that if a case is governed by section 16, section 32 can have possibly no application. In other words the power under section 16 and the power under section 32 are so mutually exclusive that they cannot co-exist, and that there can be no question of either section 16 or section 32 being applicable alternatively at the option of the Department. In support of this contention, learned Counsel naturally relied upon the Full Bench decision in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[1]. But, at the same time, he contended that the view of the Full Bench regarding the precise import of *assessment of escaped turnover* requires reconsideration in view of the two judgments of the Supreme Court referred to already. He urges that cases which under the view of the Full Bench would be cases of *escaped assessment* and not *escaped turnover*, should, after the judgments of the Supreme Court be viewed and dealt with, only as *escaped turnover*, with the result that in such cases the Deputy Commissioner will have no powers of revision. The question, therefore, is whether such a wide area is covered by section 16 of the Act, and whether, or not on the facts of the instant case, the Deputy Commissioner has got powers of revision.

We shall first briefly refer to the Full Bench decision in *State of Madras* v. *Louis Dreyfus & Co., Ltd.*[1] In that case the assessing authority excluded the turnover of certain transactions on the ground that they were outside-sales and made assessment on that basis. The revising authority, however, took a different view, re-opened the assessment and sought to re-assess under rule 14 on the ground that those purchases also would be taxable. The assessee instituted the proceedings in

1. (1956) 2 M.L.J. 327 : I.L.R. (1956) Mad. 1285, 1290, 1297 (F.B.).

question challenging the jurisdiction of the revising authority and ultimately the following question was referred to the Full Bench :

"Whether rule 14 of the Madras General Sales Tax Rules is valid, and if so, whether the powers of revision thereunder can be exercised in cases to which rule 17 relating to escaped assessment is applicable ?"

We are only concerned with the latter part of the Reference. The argument on behalf of the State was that rule 17 (1) would apply only to cases where the turnover of a dealer was not taken into account by the assessing authority either on account of concealment of such transaction by the assessee or by reason of an inadvertent omission on his part or on the part of the assessing officer and such cases only could be regarded as the turnover escaping assessment. The further argument of the State was, where the entire turnover was before the assessing authority and it was considered by it but by some error of law or fact the authority regarded the turnover or any part thereof as not assessable or allowed some exemption or allowances or deduction to which however, the assessee was not entitled to under the provisions of the Act, such a case was not a case of an escaped turnover but was a case of an improper or wrong order of assessment which was certainly capable of revision under rule 14 (2) by the revising authority.

On the other hand, the contention of the assessee was that rule 17 should be given a wide and liberal interpretation and that it would cover all cases, where by reason of some error or omission on the part of the assessing authority, the assessee had been directed to pay a lesser amount of tax than was properly payable by him. In support of this argument that a wide range of classes would come under the category of escaped turnover, on behalf of the assessee, reliance was placed upon the analogous provision in section 34 of the Indian Income-tax Act and the decisions thereunder as to the proper meaning to be given to the words *escaped assessment*.

The assessee in that case, therefore, contended that under section 34 of the Indian Income-tax Act if the assessing authority in the original order of assessment had committed some mistakes of fact or law, he would be entitled to tax the income which has escaped assessment, and that applying the same principle to cases under the Sales Tax Act, the assessing authority alone must be entitled to make the assessment under rule 17 on the basis of an escaped turnover even if the original turnover was considered by him but however excluded in the fixation of the tax liability on some erroneous view either of fact or of law. The Full Bench did not accept this argument of the assessee. The argument of the assessee based upon the analogous provisions of the Income-tax Act, section 34, was rejected in the following terms at page 1296 :

"The contention, however, raised on behalf of the assessee-respondents was that rule 17 should be understood as applicable not merely to cases of *escaped* turnover as set out above but also to every case where by reason of some error or omission on the part of the assessing authority the assessee has been directed to pay a lesser amount of tax than was properly payable by him. In this connection the analogy of section 34 of the Income-tax Act and certain decisions interpreting the scope of that section were strenuously pressed upon us. Reliance was particularly placed on the decisions of this Court reported in *The Commissioner of Income-tax* v. *Raja of Parlakimidi*[1], *The Commissioner of Income-tax, Madras* v. *Messrs. Shaikh Abdul Kadir Marakayar* & *Co.*[2] and of the Privy Council in *Commissioner of Income-tax, Bombay* v. *Khemchand Ramdas*[3]. We do not propose to discuss the facts of these cases or refer to the observations in them as regards the proper construction of section 34 of the Income-tax Act because in our opinion there is no real analogy between rule 17 (1) of the Madras General Sales Tax Rules and the provisions contained in section 34 of the Income-tax Act. The scheme of the two enactments is wholly different. The language employed in section 34 of the Income-tax Act which has undergone serious changes from time to time is not identical with that in rule 17 of the Madras General Sales Tax Rules and the mere fact that both these provisions are designed to achieve a somewhat similar purpose is too slender a foundation for the application of the cases construing one provision for determining the scope of the other. We, therefore, propose to confine our attention to the language used in the two rules 14 (2) and 17 (1) and gather the intention of the rule-making authority as expressed by words employed."

Dealing with the relative application of rule 14 (2) and rule 17 (1) the Full Bench observed as follows (at page 1295) :

1. (1925) 50 M.L.J. 63 : I.L.R. 49 Mad. 22.
2. (1927) 54 M.L.J. 298.
3. (1938) 2 M.L.J. 115 : L.R. 65 I.A. 236 : I.L.R. (1938) Bom. 487 (P.C.).

"The other question that has to be considered is thus formulated in the order of reference: 'Whether the powers of revision thereunder (under rule 14 (2)) can be exercised in cases to which rule 17 relating to escaped assessment is applicable'. In the form in which it has been stated above, it is capable of only one answer namely that the two rules are mutually exclusive and that cases which fall within rule 17 (1) and where the jurisdiction to reopen the assessment is vested in the assessing authority, the Commercial Tax Officer would not have power to pass such an order under rule 14 (2). And this was in fact conceded by the learned Advocate-General who appeared for the State. The point however debated before us—and we consider rightly—was the relative scope of rules 14 (2) and 17 (1). The argument addressed to us by the learned Advocate-General was that the two rules 14 (2) and 17 (1) have to be read together to define the precise content of each and so read, rule 17 (1) would be applicable only to cases where the turnover of a dealer has been omitted to be taken into account by an assessing authority either because there was a deliberate concealment of such transactions by the assessee or because of any inadvertent omission on his part or on the part of the assessing officer. Only such cases could with propriety be termed cases where the *turnover* has *escaped* assessment. On the other hand in cases where the entire turnover of an assessee is before the assessing authority and is considered by it, and such authority by error of fact or law treats the turnover or any part thereof as not assessable or grants a deduction or exemption to which the assessee is not entitled under the Act, the case, is not one of *escaped turnover* but of an improper or illegal assessment order which is revisable under rule 14 (2).

No doubt in a general sense both rule 14 (2) as well as rule 17 (1) serve a common purpose, *viz.*, to gather revenue which has improperly escaped But while rule 14 (2) is directed to the correction of improper or illegal assessment orders which have levied less or more tax than justified, rule 17 (1) lays emphasis on *escaped turnover*. The distinction between the two provisions might be expressed by saying that rule 14 (2) deals with escaped assessments and rule 17 (1) with escaped turnovers, notwithstanding that the latter also would mean that a lesser amount of tax has been levied. So understood the two provisions would be completely reconcilable and the two jurisdictions—to revise assessments and to reopen them—would each be assigned to the proper authority."

The learned Judges held that the true scope of rule 17 (1) (corresponding to the present section 16) must be ascertained from the use of the expression *escaped* and that a turnover could be said to have escaped when it is not noticed by the officer either because it is not before him by reason of inadvertence, omission or deliberate concealment on the part of the assessee or because of want of care on the part of the officer, the turnover, though in the books of the assessee, had not been noticed by the authority. The Full Bench repelled the argument based upon section 34 of the Indian Income-tax Act that if in the assessment order the turnover had been returned by the dealer but the assessing authority, however, treated either the whole turnover or any part thereof as not taxable or subject to any exemption, that would be a case of an *escaped turnover* which could be set right only by resort to the proceedings under rule 17 (1). The Full Bench was clearly of the view that the revising authority would have undoubted jurisdiction to revise the assessment in such cases where it was not legal or proper, when the assessing authority had erroneously treated a portion of the turnover as not taxable. The Full Bench also pointed out that such an extreme view that rule 17 (1) would alone apply to such cases, would render the powers of revision under rule 14 (2) absolutely useless and futile and that it would be difficult to conceive any case to which rule 14 (2) could apply at all. The Full Bench also took the view that there might be an intermediate class of cases in which the entire turnover is before the assessing authority, but he fails to levy the tax upon the whole or any portion of it, taking the view that the same is not taxable and on the view that certain deductions claimed by the assessee are allowable; but the assessing authority however fails to make a specific reference to these matters in the assessment order in the sense that only the final result is reflected in the order without mentioning the details as to how the computation was made. In such cases the Full Bench was clearly of the view that the records of the proceedings of the assessing authority would include the entire file and therefore the revising authority would be competent to exercise its powers of revision under rule 14 (2) regarding the legality or propriety of the order of assessment. In the instant case the assessing authority has specifically adverted to the details in his order of assessment and has also mentioned the reasons as to why a part of the turnover was not liable to be taxed, and it therefore does not come under the intermediate class of cases visualised by the Full Bench.

Learned Counsel for the petitioner concedes and has to accept the position, that according to the view of the Full Bench, the Deputy Commissioner would have jurisdiction to exercise the powers of revision under section 32 and revise

the order of the assessing authority which the Deputy Commissioner considers as vitiated by errors of fact or law regarding the turnover concerning hides and skins. It is beyond question that mistakes of fact committed by the assessing authority can be corrected by the Deputy Commissioner under section 32 as powers of revision are obviously conferred for such purposes. But as observed earlier, learned Counsel, would contend that as a result of the two decisions of the Supreme Court the instant case also would come only under the category of escaped turnover governed by section 16, and that so understood the principle of mutual exclusion of jurisdiction decided by the Full Bench should be applied, so as to rule out the powers of revision under section 32 whenever section 16 is applicable to the same situation.

While dealing with this argument, it is necessary first to refer to the judgment of the Supreme Court in *Ghanshyamdas* v. *Regional Assistant Commissioner of Sales Tax*[1] reversing the decision of High Court in *Regional Assistant Commissioner of Sales Tax* v. *Ghanshyamdas*[2] which arose under the C.P. and Berar Sales Tax Act, (XXI of 1947). The material portion of section 11-A of that Act read as follows :—

"(1) If in consequence of any information which has come into his possession, the Commissioner is satisfied that any turnover of a dealer during any period .... has escaped assessment .... the Commissioner may, at any time within three calendar years from the expiry of such period .... proceed in such manner as may be prescribed to .... assess .... the tax payable on any such turnover....... "

In that case a registered dealer submitted his return on 5th October, 1950, for the year 1949-50, *i.e.*, 22nd October, 1949 to 9th November, 1950, for one quarter only and made default in respect of the other quarters. The Assistant Commissioner of Sales Tax issued a notice to the assessee on 13th August, 1954 in respect of the turnover of the firm for the rest of the period, *i.e.*, for the other three quarters. Two main questions arose for decision : (*a*) Whether it was a case of *turnover which has escaped assessment* within the meaning of section 11-A and (*b*) if so, when would the period of three years specified under section 11-A commence and terminate. The Supreme Court held that a turnover can be said to have escaped assessment even in a case in which no assessment has been made at all. The Department's contention was that if there has been no assessment at all it was not a case of an escaped assessment but may be a case of *post assessment detection of evasion of tax*. The Supreme Court did not accept this narrow view put forward by the Department but held that the turnover could be properly said to have escaped assessment even when no assessment at all has been made. The Supreme Court applied the principle underlying the analogous provisions of section 34 of the Indian Income-tax Act and the cases rendered thereunder particularly, *Maharaj Kumar* v. *I. T. Commissioner*.[3] and *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar*[4] (Supreme Court decisions already referred to). Regarding the relevancy of the applicability of the reasonings contained in the decisions arising under the Indian Income-tax Act the Supreme Court stated the matter thus (at page 770) :

"It is true that the said decisions were given with reference to either section 34 (1) of the Income-tax Act or section 14 of the Business Profits Tax Act, but so far as the present enquiry is concerned the said sections are in *pari materia* with section 11-A of the Act. In construing the meaning of the expression *escaped assessment* in section 11-A of the Act there is another reason why the said expression should bear a more limited meaning than what it bears under the said two Acts. All the three Acts are taxing statutes and the three relevant sections therein are intended to gather the revenue which has improperly escaped. A Division Bench of the Madras High Court in *The State of Madras* v. *Balu Chettiar*[5] following the decision of a Full Bench of that Court held that where an assessee did not file at any time a return of his turnover for a year and, therefore, there was no assessment made, the turnover escaped assessment. It was observed therein :

'Whether it was a case of omission or of deliberate concealment on the part of the assessee, he did not submit any return. It was his default that led to the escape of the turnover for 1951-52 from assessment to the tax lawfully due. It was the whole of the turnover for that year that escaped assessment.' "

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1. A.I.R. 1964 S.C. 766.
2. A.I.R. 1958 M.P. 148.
3. (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An. W.R. (S.C.) 92 : (1959) S.C.J. 230 : A.I.R. 1959 S.C. 257.
4. (1960) S.C.J. 145 : (1960) M.L.J. (Crl.) 83 : (1960) 1 S.C.R. 332.
5. (1956) 2 M.L.J. 313 : A.I.R. 1957 Mad. 681, 682.

In view of these observations of the Supreme Court about the relevancy and bearing of the cases arising under the Income-tax Act the view taken by the Madras High Court that there is no real analogy between rule 17 (1) of the Madras General Sales Tax Act and the provisions contained in section 34 of the Indian Income-tax Act and that the scheme of the two enactments is wholly different, cannot be regarded as correct. Decisions of the Privy Council and the Supreme Court arising under the Income-tax Act would undoubtedly be useful and relevant for determining the precise import of the words *escapement of turnover* and the ambit of the jurisdiction of the assessing authority under section 16 in the matter of assessment of escaped turnover.

We shall now examine the scope of the decisions of the Supreme Court aforesaid. In *Maharaj Kumar* v. *I. T. Commissioner*[1] the Income-tax Officer, following an earlier decision of the Patna High Court omitted to bring to assessment a certain sum representing the interest and arrears of rent due to the assessee in respect of agricultural lands in the view that the amount was agricultural income. Subsequently the Privy Council reversed the decision of the Patna High Court followed by the Income-tax Officer. Thereupon the Income-tax Officer initiated re-assessment proceedings under section 34 (1) (*b*) (after the amendment of 1948) to re-assess the said sum. The Supreme Court held that the word *escaped* in section 34 (1) (*b*) was not merely confined to cases where no return had been submitted by the assessee or where income had not been assessed owing to inadvertance or oversight but would also cover a case where a return had been submitted and the Income-tax Officer after applying his mind to the details held that a part of the income was not assessable to income-tax. The matter was explained thus by the Supreme Court at page 261 :

"There is no doubt that a part of the assessee's income had not been assessed and, in that sense it has clearly escaped assessment. Can it be said that, because the matter was considered and decided on the merits in the light of the binding authority of the decision of the Patna High Court, no income has escaped assessment when the said Patna High Court decision has been subsequently reversed by the Privy Council ? We see no justification for holding that cases of income escaping assessment must always be cases where income has not been assessed owing to inadvertance or oversight, or owing to the fact that no return has been submitted. In our opinion even in case where a return has been submitted, if the Income-tax Officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment. The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word 'escape' in section 34 (1) (*b*) cannot therefore succeed".

In *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar*[2] the question arose under the Bihar Agricultural Income-tax Act of 1938. In that case the assessee had included in his return a particular item of income but the Agricultural Income-tax Officer omitted to bring that item to tax in the original assessment in the view that it was exempt. Later on, the Agricultural Income-tax Officer issued a notice under section 26 of the Act to include that income also on the ground that it was liable to income-tax and the question arose whether the provisions of section 26 of the Act were applicable to that case. Section 26 of the Act may be set out :

"If for any reason any agricultural income chargeable to agricultural income-tax has escaped assessment for any financial year, or has been assessed at too low a rate, the Agricultural Income-tax Officer may, at any time within one year of the end of that financial year, serve on the person liable to pay agricultural income-tax on such agricultural income or, in the case of a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of section 17, and may proceed to assess or re-assess such income, and the provisions of this Act shall, as far as may be, apply accordingly as if the notice were a notice issued under that sub-section :

Provided that the tax shall be charged at the rate at which it would have been charged if such income had not escaped assessment or full assessment as the case may be."

The argument of the assessee was that despite the use of the opening words of the section "if for any reason" the section should not receive the wide interpretation as contended for by the Department but that the scope of the section should be restricted

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1. (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An. W.R. (S.C.) 92 : (1959) S.C.J. 230 : A.I.R. 1959 S.C. 257.
2. (1960) S.C.J. 145 : (1960) 1 S.C.R. 332.

so as to have no application to cases where the whole income is returned by the assessee in his return but either the whole or a portion of it however is held by the assessing authority as not being liable to tax. The assessee relied upon certain decisions in support of the contention including some of the Privy Council and of the Supreme Court. On behalf of the Department reliance was placed upon the decision of the Supreme Court earlier discussed in this judgment. The Supreme Court took the view that in view of its clear pronouncement in *Maharaj Kumar* v. *I.T. Commissioner.*[1] there was no necessity to consider in detail again the several decisions cited on behalf of the assessee. The contention of the assessee that an earlier judgment of the Supreme Court in *Chatturam Horilram Ltd.* v. *Commissioner of Income-tax*[2] took a different view, and that that decision was more directly in point than the later decision of the Supreme Court in *Maharaj Kumar Kamal Singh's case*[1] was not accepted. Finally the argument on behalf of the assessee that there would be *escaped assessment* only if there was some *lacuna* other than that attributable to the assessing authorities was not accepted and it was held that section 34 (dealing with income escaping assessment) would apply alike to cases in which there is a concealment of the income by the assessee or cases in which on account of an error of law or fact the assessing authority excludes the income from assessment though contained in the return of the assessee.

Relying upon the aforesaid observations of the Supreme Court in the above two decisions, learned Counsel for the petitioners contends that the words *escaped turnover* should similarly receive a wider meaning than the one indicated in the judgment of the Full Bench of the Madras High Court. To put it in different language learned Counsel would contend that the instant case would be governed by section 16 as a case of an *assessment of escaped turnover*, even though the details of all the transactions were mentioned in the return submitted by the assessee but a portion of the same however was excluded by the assessing authority.

We have examined with care the judgment of the Supreme Court in *Ghanshyamdas* v. *Regional Assistant Commissioner of Sales Tax*[3] in which section 11-A of the C. P. and Berar Sales Tax Act came up for consideration. We are of the opinion that it does not help the assessee for the extreme contention urged on his behalf that whenever the true turnover has not been assessed to the tax section 16 alone would be applicable ruling out section 32 altogether. In that case the Supreme Court held that if an assessee did not submit a return and if the assessing authority assessed the turnover it was clearly a case in which the turnover has escaped assessment. It should not be overlooked that the Supreme Court had not to consider the relative jurisdiction of the assessing authority in *juxta-position* with the jurisdiction of the appellate authority or the revising authority in a situation like the instant case. Further in that case no return at all was submitted by the assessee and there was no question of the assessing authority applying its mind to the return and excluding a portion of the turnover from an assessment by granting some exemption or deduction or allowance. The other two decisions of the Supreme Court, *Maharaj Kumar* v. *I. T. Commissioner*[1] and *Maharajadhiraj Sir Kameshwar Singh* v. *State of Bihar*[4] do not advance the contention of the assessee any further, as there also the Supreme Court had only to deal with the jurisdiction and powers of the assessing authority without any reference to the powers of the appellate or the revisional authority. Under the Income-tax Act there is no question of *escapement of turnover*, but it was only a case of income escaping assessment. The view of the Supreme Court was that a wide meaning should be given to section 34 of the Indian Income-tax Act in the matter of assessing income which has escaped liability to income-tax, so as to cover cases in which the Income-tax Officer had applied already his mind and come to some conclusion. These two decisions therefore cannot be regarded as authorities warranting the conclusion that if as a result of the wide meaning given to the words

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1. (1959) 1 M.L.J. (S.C.) 92 : (1959) 1 An. W.R. (S.C.) 92 : (1959) S.C.J. 230 : A.I.R. 1959 S.C. 257.
2. (1955) S.C.J. 571 : (1955) 2 S.C.R. 290
3. A.I.R. 1964 S.C. 766.
4. (1960) S.C.J. 145 : (1960) 1 S.C.R. 332.

turnover escaping assessment there should be any overlapping of jurisdiction of the assessing authority under section 16 and the revising authority under section 32, the latter would have no jurisdiction to correct the error committed by the assessing authority. With respect we agree with the view taken by Jagadisan and Venkatadri, JJ., in the unreported case, Tax Case Nos. 56 and 58 of 1963 (though the view expressed by them regarding the relevancy of the decisions under the Income-tax Act may not be correct in view of the judgments of the Supreme Court referred to above), that the provisions of sections 16 and 32 are not so mutually exclusive as to preclude a case falling under section 16 of the Act being dealt with under section 32. There may be overlapping if a wide meaning is given to the words *turnover escaping assessment*. But that certainly cannot deprive the revising authority of its revisional jurisdiction conferred under the plain terms of the section.

The other unreported decision of Srinivasan and Venkatadri, JJ., in Tax Case No. 85 of 1962 is an instance to show that there may be overlapping between section 16 and section 32 in certain situations. In that case the assessing authority in his original order of assessment committed certain errors and it was held that under section 16 of the Act he can assess the turnover which was originally wrongly excluded from taxation. The Bench gave an extended meaning to the words *turnover... escaped assessment* in view of the decisions of the Supreme Court referred to above. It must be observed that the Bench had not to consider the question as to whether in that situation, the revisional authority, the Deputy Commissioner, could have exercised its powers of revision, under section 32 of the Act. We are of the opinion that under the present scheme of the Act, in which the entire machinery for assessment regarding the jurisdiction and powers of the original assessing authority as well as the appellate or the revisional authority have been incorporated in the Act itself, the question has to be decided upon the plain terms of the corresponding sections. It should be noticed that even under the old Act of 1939, by G.O. No. 193, dated 28th January, 1954, sub-rule (3-A) was added to rule 17 to the effect that powers conferred under sub-rules (1) and (3) of rule 17 upon the assessing authority or the licensing authority may also be exercised by the appellate authority or by the revising authority within a period of five years next succeeding that to which the tax relates. This amendment makes the position clear that the Legislature did not visualise a clear cut, well defined, mutually exclusive jurisdiction of the assessing authority as against the revisional authority, each being restricted to operate in its own field without any overlapping. In other words rule 17, sub-rule (3-A) visualises and speifically provides for the two jurisdictions co-existing with instances of overlapping. If section 32 is construed in this background we are clearly of the opinion that the power of revision of the Deputy Commissioner is a separate and independent power which can be exercised whenever he is of the opinion that the original assessing authority has committed any error of law or fact. We are unable to see any force in the contention that the mere fact that the assessing authority also has got a power to reconsider his decision by correcting his mistakes, assuming that he has got such a power should be construed as curtailing or negativing the powers of revision expressly conferred upon the Deputy Commissioner. The fallacy in the extreme contention of the assessee will be seen by taking a simple illustration. Suppose the assessing authority in his considered view of the law or of the facts of the case excludes a portion of the turnover, its chances of reconsidering its decision on the basis of a *turnover escaping assessment* are very remote. The right of appeal is available, to the assessee only, and not to the Department. Yet, if the contention of the petitioner is accepted, it would be a case to which section 16 alone awould apply and the powers of revision under section 32 cannot be invoked at all, however erroneous the order of the assessing authority may be. It is impossible to countenance such a view which negatives the powers of revision in such a situation. If the argument of learned Counsel for the assessees should be accepted, we are clearly of the opinion that it is impossible to conceive of any case to which section 32 would be attracted and it will have no place in the structure and scheme of assessment under the Act. Such a view would be opposed to the well settled rule of construction that there should be a harmonious reading of all the provisions of the statute and no provision should be rendered

as serving no purpose, as a result of giving a wide construction to some other provision. Every effort should be made to secure a harmonious reading and construction of the several sections of the Act as a whole.

This aspect of the two powers and jurisdiction co-existing was adverted to and emphasised by the Supreme Court in the case in *State of Kerala* v. *M. Appukutty*[1]. In that case the scope of rule 17 (1) (1-A), (3-A), and section 12 of the Madras General Sales Tax Act of 1939 came up for consideration. The Supreme Court rejected the argument put forward on behalf of the assessee that the totality of the powers of the Deputy Commissioner are contained in section 12 (2) and that unless there was a substantive proceeding pending in his file the Deputy Commissioner had no power to assess an escaped turnover. While explaining the scope of the two powers and jurisdiction the matter was put thus by the Supreme Court at page 799 :

> "Moreover section 9 does not deal with escaped turnovers but is a provision for the determination of the turnover of a dealer in the first instance nor can it be said that rule 17 is in conflict with section 12 (2). That section deals with another state of affairs and another jurisdiction *i.e.*, where the Deputy Commissioner *suo motu* or on an application made calls for the record and determines the legality or propriety of an order made by one of the subordinate officers. It cannot be said in view of rule 17 that the powers of revision by the Deputy Commissioner is limited to powers under section 12 (2). Rule 17 deals with a separate and independent jurisdiction in regard to the determining and taxing escaped turnovers. The provisions of section 12 (2) are in no way in conflict with the powers conferred under rules 17 (1), 17 (1-A) and 17 (3-A)."

From this it follows that section 16 should not be construed as in any way delimiting or curtailing the powers of revision conferred under section 32. Reference may also be made to the recent judgment of the Supreme Court in *State of Orissa* v. *Debaki Devi*[2] rendered under the Orissa Sales Tax Act (XIV of 1947). Two questions arose in that case, (i) relating to the power of re-assessment in the case of an under-assessment or an escaped assessment under section 12 (7) and the power of revision under section 23 (3) and (ii) the period of limitation for exercising the powers of revision under section 23 (3).

We are not concerned with the second question but the observations of the Supreme Court on the first question are useful and relevant in the instant case as emphasising that the power of revision is a distinct and separate power different from the power to assess in the case of an under-assessment or escaped assessment. Section 12 (7) of the Orissa Act provides that if for any reason the turnover of a dealer has escaped assessment or has been under-assessed the Collector may call for a return within 36 months of the end of the period in question and may proceed to assess the amount of tax in the manner laid down in sub-section (5). Section 23 provides for the right of appeal and the power of revision. Section 23 (3) provides that,

> "Subject to such rules as may be prescribed and for reasons to be recorded in writing, the Collector may upon application, or of his own motion, revise any order passed under this Act or the Rules thereunder by a person appointed under section 3 to assist him, and, subject as aforesaid, the Revenue Commissioner may, in like manner, revise any order passed by the Collector."

In that case in an appeal by the assessee, the Assistant Collector of Sales Tax allowed certain deductions from the taxable turnover. Subsequently the Orissa High Court delivered judgment in another case from which it followed that the view taken by the Assistant Collector was wrong in allowing the deduction. Thereupon the Collector of Sales Tax acting under section 23 (3) of the Act, exercised the powers of revision. The argument of the assessee that the impugned orders of the Collector in the purported exercise of the powers of revision under section 23 (3) of the Act were in substance under section 12 (7) was not accepted. The Supreme Court (majority judgment), explained the position thus dealing with the relative scope of the provisions, section 12 (7) and section 23 (3) at page 1417 :

> "The first contention urged on behalf of the State of Orissa is that the High Court is wrong in holding that an order of assessment of revising authority is necessarily one made under section 12 (7). *The power of revision granted by section* 23 (3) *is clearly a distinct and separate power from the power to assess* after calling for a return in case of under-assessment or escaped assessment. The mere fact that in a particular case the revising authority has by a fresh order of assessment made the dealer liable for tax in respect of which he can be said to have been *under-assessed or to have escaped assessment does not make*

1. (1963) 2 M.L.J. (S.C.) 131 : (1963) 2 An. W.R. (S.C.) 131 : (1963) 2 S.C.J. 663 : A.I.R. 1963 S.C. 796 (799). 2. A.I.R. 1964 S.C. 1413 (1417).

the two powers one and the same. We therefore find it difficult to agree with the High Court that section 12 (7) includes also the re-assessment made by the revising authority under section 23 (3)."

We are, therefore, of the opinion that the power of revision can be exercised by the Deputy Commissioner under section 32 to correct errors committed by the assessing authority in his order of assessment, irrespective of the question as to whether the said errors could also be corrected by the assessing authority himself. The power under section 32 is a distinct and separate power and its exercise cannot be controlled by any power which may inhere in the assessing authority under section 16.

Learned Counsel relied upon the decision of the Andhra Pradesh High Court in *Messrs. B. O. I. Akola v. State*[1]. In that case the assessee did not include in his return the purchases made through local dealers and his return was accepted. For the same year the assessee was treated as a non-resident principal and three local dealers were assessed to sales tax as agents of the petitioner-assessee on the local purchases made on his behalf. Those dealers contested their liability, and it was held that the assessee must be treated as a resident-dealer as it had a branch within the State and that therefore the local dealers could not be assessed as agents of the assessee. Pursuant to this decision, the Deputy Commissioner of Commercial Taxes assessed the petitioner to additional tax on the turnover included originally in the assessments of the local dealers. On revision it was contended on behalf of the assessee that the Deputy Commissioner had no jurisdiction to act under section 12 (2) of the Madras General Sales Tax Act of 1939 and that the only provision under which such escaped turnovers could be assessed was under rule 17 (1) of the Madras General Sales Tax Rules. This contention was accepted. We are of the opinion that this Bench decision of the Andhra Pradesh High Court, far from supporting the petitioner in this case, is really against him. The observations of the learned Judges clearly point out the distinction between a case in which no return was submitted and a case in which on the return submitted the assessing authority, after applying its mind, excludes a portion of the turnover. In the latter case the Andhra Pradesh High Court has clearly expressed the view that the power of revision can be exercised. Reference may be made to the following observation at page 222 which makes the position clear:

"According to the learned Government Pleader, rule 14-A empowers the Deputy Commissioner to re-assess the petitioners to tax in respect of the escaped turnover. Rule 14-A, as is clear from the language contemplates the case of a tax determined by the initial assessing authority. Where an appellate or revising authority considers that the tax so determined is less than the correct amount of the tax payable by the dealer, it is open to the revising authority to determine the correct amount of tax payable by the dealer after following the prescribed procedure. The very basis on which power of revision envisaged by rule 14-A could be exercised, therefore, should be with reference to the tax determined by the initial assessing authority .... As already pointed out, the revising authority is not an "assessing authority" and cannot make an assessment or re-assessment in respect of an escaped turnover. His duties are purely revisional, that is, they are confined only to revise an order already passed by the initial assessing authority."

In the course of the hearing, learned Counsel for the petitioner laid considerable stress on the fact that in the instant case his client did not submit any return and that the original order of the assessing authority fixing the turnover at Rs. 12,866.77 was based only upon the accounts of the assessee which had been checked and perused by the assessing authority. We do not think that this circumstance makes any difference as to rule out the applicability of section 32. Whether or not a return is submitted by the assessee, if the assessing authority applies his mind to the business dealings and transactions of an assessee and excludes certain items in the assessable turnover on an erroneous view of the law the revising authority will have undoubted jurisdiction to exercise its powers of revision. What is of importance is the fact, that the assessing authority had applied its mind to all the dealings and transactions of the assessee.

We therefore, hold that in the present case, the Deputy Commissioner had ample jurisdiction to exercise his powers of revision under section 32 of the Act.

The Revision Petition is, therefore, dismissed. No costs.

V.K. —————— *Petition dismissed.*

1. I.L.R. (1960) 1 A.P. 213.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. KUNHAMED KUTTY.

Corporation of Madras ... *Appellant**

v.

Arumugham ... *Respondent.*

Prevention of Food Adulteration Act (XXXVII of 1954), *sections* 7, 16, *and* 20, *and Rules* 44 (*e*) *and* 46 *of Rules of* 1955—*Adulteration of ghee—Reichert value of* 22.5 *per cent—Analyst's certificate—Adulteration of* 13 *per cent. extraneous fat—Proof of adulteration—Food Inspector authorised to institute prosecutions—General authority—Complaint filed under sections* 7 *and* 16 *and rules* 44 (*c*) *and* 46 *or under* 44 (*b*)—*Want of specific sanction for contravention of items in terms—Prosecution not affected.*

Act XXXVII of 1954 defines what ghee is and what adulteration of ghee is and when the Rules say that any deficiency in the Reichert value below a particular stipulated figure means a substandard quality and such substandard quality is by the definition of Act an adulteration, it will not be open to Court to investigate about a Reichert value and its bearing upon the quantum of fat in different areas in the country.

The Food Inspector authorised under section 20 (1) of the Act would act in relation to all prosecutions under the Act and not in relation to a specific or a particular case. When, a complaint is filed under sections 7 and 16 of the Act read with rules 44 (*e*) and 46 or with rule 44 (*b*), the sanctioning authority must be deemed to have exercised his mind in considering the Analyst's Report the elements constituting the offence. Any want of specific sanction for contravention of the items in terms defined in Appendix B would not affect the prosecution.

Appeal under section 417 (3) of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid respondent (accused) of offences under sections 7 and 16 read with rules 44 (*c*) and 46 of the Prevention of Food Adulteration Rules, 1955, by the Third Presidency Magistrate, Saidapet, Madras, in M.P. No. 211 of 1963 on his file dated 12th September, 1963.

T. A. Ramaswami Reddy, for Appellant.

P. Srinivasan, for Respondent.

B. Sriramulu and *S. R. Srinivasan* for the Public Prosecutor on behalf of the State.

The Court delivered the following

JUDGMENT.—This appeal is against the acquittal of the respondent, Arumugham by the Third Presidency Magistrate, Saidapet, for an offence punishable under sections 7 and 16 of the Prevention of Food Adulteration Act read with rules 44 (*c*) and 46 of the Rules framed thereunder. The Food Inspector of the Corporation of Madras, P.W. 1 purchased from the respondent on 21st September, 1962, a sample of ghee exhibited for sale which when analysed by the Public Analyst, was found adulterated with 13 per cent. of foreign fat.

There is no dispute that after P.W. 1 purchased the sample of the ghee, he had conformed to the formalities in the matter of dividing the sample and sending 1/3rd thereof to the Public Analyst. The result of the analysis disclosed 87 per cent. genuine ghee, 13 per cent. foreign fat (not derived from milk or cream) and a Reichert value of 22.5 per cent. so that the Analyst certified that the sample was adulterated with 13 per cent. extraneous fat and this opinion was based on Item A-11.14 of Appendix-B of the Rules which prescribes the minimum Reichert value of genuine ghee for the State of Madras to be 26.

The learned Magistrate found that the prosecution had not established any extraneous fat or added matter not exclusively derived from milk in the sample purchased from the respondent and, therefore, there was no violation of rule 44 (*c*) or 46 though, according to him, regard being had to the definition in section 2 (i) (*l*) of the Act, a violation of Item A-11.14 would amount to an offence. He further observed that section 16 of the Act deals not only with violations of offences in the Act but also the Rules and there can be no two opinions that the respondent would be liable for offences punishable under section 7 read with section 16 of the

* C.A. No. 930 of 1963. 23rd April, 1965.

Act if the other conditions prescribed in the Prevention of Food Adulteration Act are satisfied.

For the respondent, it was sought to be made out that the variations in the Reichert value was due to the fact that the ghee in question was from the milk procured in Coimbatore and the cattle in Coimbatore are fed with cotton seeds. The learned Magistrate was not prepared to go into this question as the violations of the provisions of the Act as well as the Rules are offences *per se*. But a further contention was urged before him that section 20 of the Act had not been complied with and that Exhibit P-5 the sanction, did not set out the offence which the accused had committed. He upheld this contention as in his view the averment that the sample was adulterated with 13 per cent. of foreign fat was not a correct description of the offence which the respondent had committed and following the decision of this Court in *Bala Chand* v. *Food Inspector*[1] disposed of by Kailasam, J., on 2nd August, 1963 which, in his opinion, applied on all fours to the facts of the case before him, he held that the prosecution for contravention of Item A-11.14 of Appendix-B has to fail for want of compliance of section 20 of the Prevention of Food Adulteration Act.

The observations of Kailasam, J., relied on by him were made after a consideration of section 20 of the Act in the light of the Supreme Court ruling in *State of Bombay* v. *Kannaylal*[2] and the Privy Council ruling in *Gokulchand Dwarkadas* v. *The King*[3] a case under clause 23 of Cotton Cloth and Yarn (Control Order, 1943), approved by the Supreme Court in *Madan Mohan* v. *State of Uttar Pradesh*[4]. The learned Judge observed :

"The Health Officer while giving his consent in writing, exercised his mind only as regards ghee containing 15% foreign fat. In fact, the note requesting for sanction to prosecute specifies only rules 44 (*e*) and 46. There is nothing to show that the Health Officer considered the report of the Public Analyst that the Reichert value was less than that prescribed under Item A-11.14 of Appendix B and, therefore, decided that the accused should be prosecuted. As the written consent was not given after consideration of the fact for prosecuting the accused for selling ghee, which did not come up to the standard as regards the Reichert value, the accused cannot be prosecuted for that offence."

Under clause (*l*) of sub-section (i) of section 2, an article of food can be deemed adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability. 'Prescribed' is defined in clause (xii) as meaning " prescribed by Rules made under this Act" and such rules in the context are rules 44 (*c*) and 46. Item A-11.14 which defines ' ghee ' as the pure clarified fat derived solely from milk or from curd or from cooking butter or from cream to which no colouring matter or preservative has been added has not been conformed to in the present case as the minimum Reichert value which ought to be 26 in Madras was found to be only 21.9. In fact, the learned Magistrate himself has held the ghee in question to be a substandard one and, therefore, adulterated. But he acquitted the accused, as the consent required to prosecute him had not been obtained in the manner indicated by Kailasam, J. in *Balachandra and another* v. *The Food Inspector*[5].

In *Subramaniam* v. *The Food Inspector*[6] disposed of on 5th September, 1962, Ramakrishnan, J., had to deal with a case of ghee adulterated with foreign fat. The analysis had disclosed that the sample of ghee contained only 21.7 Reichert value which, according to the Rules shall be not less than 26 per cent, so that the charge-sheet stated that the ghee was adulterated by 17 per cent. of fat. It appears to have been urged before Ramakrishnan, J., among other contentions, that the accused had no opportunity to verify the Analyst's Report about the Reichert value. The learned Judge negatived this contention on the short ground that section 13 (5) of the Act enabled the prosecution to use the Analyst's Report as evidence of the facts stated therein, unless superseded under sub-section (3) of

1. Criminal Appeal Nos. 198 to 202 of 1963.
2. (1961) 1 M.L.J. (S.C.) 59 : (1961) 1 An.W.R. (S.C.) 59 : (1961) 1 S.C.J. 226 : (1961) M.L.J. (Crl.) 146.
3. (1948) 1 M.L.J. 243 : A.I.R. 1948 P.C. 82.
4. A.I.R. 1954 S.C. 637.
5. Cr. A. Nos. 128 to 202 of 1963.
6. Crl. R.C. 452 of 1961.

section 13. It was open to the accused to have taken advantage of the provision in section 13 (2) if he wanted a further verification of the aforesaid report; but not having done so, the Judge observed, there was no reason to doubt the result of the analysis revealed in the Analyst's certificate.

A further contention urged more relevant in the present context, was that from the deficiency in the Reichert value, it could not be assumed that the ghee was adulterated with fat. This contention was sought to be supported by urging *inter alia* that since the milk of cattle reared in different parts of the country vary in their quality, the Reichert value could not be a dependable guide. This contention was not upheld by Ramakrishnan, J. He observed:

"But it is not possible to embark on any such investigation. The reason is that so far as the Food Adulteration Act and the Rules thereunder are concerned, what is pure ghee and what is adulteration of ghee are matters of definition. When the Rules say that any deficiency in the Reichert value below a particular stipulated figure means a substandard quality and such substandard quality is by definition an act of adulteration, it will not be open to the Court to embark on an academic investigation about the Reichert value and its bearing upon the quantum of fat in milk in different areas in this country. The Supreme Court in *M. V. Joshi* v. *M. V. Shimpi*[1] while dealing with an analogous case of adulteration of butter observed:

"If the quality or purity of butter fall below the standard prescribed by the said Rules or by its constituents are in excess of the prescribed limits of variability, it shall be deemed to be adulterated within the meaning of section 2 of the Act. If the prescribed standard is not attained, the statute treats such butter, by fiction, as an adulterated food, though in fact it is not adulterated.

The same reasoning will apply when the quality of ghee and its definitions for the purpose of adulteration are prescribed by the Statute in relation to the result revealed in the laboratory for the Reichert test."

I am in respectful agreement with the above observations and, therefore, I have no hesitation to hold that the ghee in this case is adulterated within the meaning of the Act.

The further question is whether the acquittal of the respondent for non-compliance of section 20 (1) can be upheld. The argument was that the prosecution in the instant case was not instituted either by the State Government or by a local authority or by a person authorised in that behalf by the State Government or local authority and, therefore, the prosecution by the Food Inspector was unsustainable. By G.O. No. 1861, dated 6th June, 1956, the Food Inspectors appointed under section 9 of the Act have been authorised by the State Government under section 20 (1) to institute prosecutions for offences under the Act. The prosecution in this case was instituted by the Food Inspector by virtue of the authority thus given to him and the fact has been specifically stated in the complaint. The objection in terms urged before me appears to have been urged before Veeraswami, J., in *Madurai City Co-operative Milk Supply Union* v. *The Food Inspector*[2]. The argument in this case, was that persons like Food Inspectors could be authorised under section 20 (1) of the Act only in relation to a specific or a particular case and not in general terms applicable to all prosecutions. The learned Judge was not inclined to countenance this argument. He observed at page 174:

"I am unable to agree with the construction contended for. The words 'in this behalf' in sub-section (1) do not bear in the context the meaning attributed to them. In my view, they mean no more than the authority vested in the State Government or a local authority for the purpose of enabling the person to institute a prosecution. The intention appears to be to provide for a delegation by the State Government or a local authority of its power to institute prosecution under the Act. To construe the section in the way the learned Counsel has asked me to do would defeat the very purpose of this provision for delegation of the power to institute a prosecution. Once authorised to institute a prosecution, the authority so vested in the person is of the same quality and virtue as the power of the State Government or a local authority to institute a prosecution. This is in contrast with a case of a person enabled to institute a prosecution with the written consent of any of the parties enumerated in the sub-section. In my opinion, therefore, the Food Inspector in this case was competent to lay the complaint."

If I may say so with respect, the above reasoning applies to this case and there is no substance in the contention that the prosecution instituted on the complaint and consent by the Food Inspector in this case has to fail.

1. (1961) M.L.J. (Crl.) 649 : (1961) 2 M.L.J. (S.C.) 145 : (1961) 2 S.C.J. 571 : (1961) 2 An. W.R. (S.C.) 145 : A.I.R. 1961 S.C. 1494.
2. (1961) M.W.N. (Cr.) 172.

The Food Inspector has satisfied himself that the ghee of which sample was taken by him was adulterated. In *Balachandra and another* v. *The Food Inspector*[1], already referred to by me, Kailasam, J., has taken the view that where the offence relates to contravention of rule 44 or rule 46, the Officer giving sanction to prosecute should not only consider the Report of the Analyst but also all the facts which constitute the offence in each case. For instance, if the contravention is of Item A-11.14 of Appendix-B, it is not sufficient if sanction for prosecution is accorded for selling adulterated ghee, it should further specify the manner in which the relevant rules and the items have been contravened.

Appendix B deals with definitions and standards of quality of different articles of food and they are the standards of quality of various articles of food required under rule 5. Rule 44 prohibits sale by oneself or by any servant or agent among other things, ghee which contains any added matter not exclusively derived from milk fat. Rule 46 reads :

"No person shall sell or have in his possession for the purpose of sale or for use as an ingredient in the preparation of an article of food for sale a mixture of ghee or butter or any substance (*a*) prepared in imitation of or as a substitute for ghee or butter; or (*b*) consisting of or containing any oil or fat which does not conform to the definition of ghee."

When, therefore, a complaint is filed under sections 7 and 16 of the Act read with rules 44 (*c*) and 46 or with rule 44 (*b*), the sanctioning authority must be deemed to have exercised his mind in considering the Analyst's Report the elements constituting the offence. In this view, I am unable to subscribe to the view that want of specific sanction for contravention of the items in terms defined in Appendix-B would affect a prosecution when the offences contemplated by the non-conformity with the definitions and standards of quality are those mentioned in rules 44 and 46. In this case, as already indicated, I prefer to follow the decisions in *Madurai Co-operative Milk Supply Union* v. *The Food Inspector*[2], and *Subramaniam* v. *The Food Inspector*[3], so that to my mind, the acquittal of the respondent by the learned Magistrate was not justified. His acquittal is, therefore set aside and he is convicted under sections 7 and 16 of the Prevention of Food Adulteration Act, and rules 44 (*c*) and 46 of the Rules thereunder. I sentence him, in the circumstances of this case to pay a fine of Rs. 25 within two weeks from this date and in default to undergo simple imprisonment for one week.

V.S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI.

Messrs. M. K. Annamalai Chettiar & Co., By Partner Sri A. Sundaram Chettiar, Perundurai, Coimbatore District .. *Petitioner**

v.

Deputy Commercial Tax Officer, Perundurai and another .. *Respondents.*

Madras General Sales Tax Act (I of 1959), section 41 (2) and (4)—Search under—Documents and accounts seized—If could be used in support of assessment—Validity of the seizure—If would affect the admissibility of the documents seized.

Practice—Documents or evidence obtained by exercise of illegal powers—Admissibility in evidence.

Documents and account books seized by the departmental authorities in the course of a raid under section 41 of the Madras General Sales Tax Act are clearly admissible in evidence and can be legally used in support of the assessment even though the provision of the statute in pursuance of which the raid and seizure were conducted were unconstitutional or illegal. The illegality or impropriety of a search and seizure may give a discretion to the Court or tribunal in certain circumstances whether to allow the evidence so obtained. But its admissibility in evidence depends not on the means adopted in securing the same but on the question of relevancy. So long as the books of account or documents

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1. Criminal Appeal Nos. 198 to 203 of 1963. 3. Crl. R.C. No. 452 of 1961.
2. (1961) M.W.N. (Crl.) 172.

*W.P. Nos. 1217 and 1218 of 1965. 26th March, 1965.

seized during a raid are relevant to the assessment they can be used in evidence irrespective of how it is obtained.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein in each petition and in the affidavit filed with W. P. No. 1217 of 1965 on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari* in each petition calling for the records of the Deputy Commercial Tax Officer, Perundurai the 1st Respondent in each of the petitions relating to the assessment orders passed by him on the petitioner firm in A. S. No. 2154/62-63 dated 6th January, 1965 and M. G. S. T. No. 2783/63-64 dated 30th January, 1965 respectively and quash the said orders.

K. Srinivasan, D. S. Meenakshisundaram and *K. C. Rajappa*, for Petitioner.

The Court made the following

ORDER.—The only point raised in these petitions to quash the assessment orders is that, inasmuch as they were based on documents or accounts which had been seized illegally, they are invalid. The contention is that, since this Court has held sub-sections (2) and (4) of section 41 of the Madras General Sales Tax Act to be unconstitutional or not competent (*Shri Ramkishan Srikishan Jhaver* v. *Commissioner of Commercial Taxes*[1]) search and seizure of the documents were illegal and that the documents and account-books so obtained cannot legally be used in support of the assessments.

It seems to me that this contention has no force. It is one thing to say that search and seizure of documents and account books is illegal and it is quite another that, because of that, the documents so seized cannot legally be used as evidence. The second result does not follow from the first. I think that whatever means by which the documents have been obtained, their admissibility will depend only on their relevancy and not on the means by which they have been procured. At the trial, of course, the Court may have discretion whether in given circumstances evidence secured by improper or illegal means could be allowed as evidence. But beyond that, I can find no objection, legal or otherwise, to the user made of the documents or account-books as evidence, because they have been searched for and seized under provisions of law which do not confer the power to do so or which the Court has declared to be in excess of legislative power or *ultra vires*.

The proposition seems to receive support from *Kuruma* v. *The Queen*[2], the ratio of which is that irrespective of the means or the manner by which evidence is secured, its admissibility is dependent on the question of relevancy and such evidence cannot be ruled out, on the ground that it had been procured by improper means or illegally. In fact, in that case, the Judicial Committee quoted with approval the following observation of Crompton, J., in *Reg* v. *Leatham*[3]:

> "It matters not how you get it (evidence) if you steal it even it would be admissible."

The Privy Council itself, in the Appeal Cases, expressed its opinion that, if the evidence is relevant, it is admissible and the Court is not concerned with how it is obtained. But Mr. Srinivasan for the petitioner argues on the basis of some observations in the Appeal Cases that, if the documents or account-books have been seized which is unconstitutional, it may make a difference to their admissibility. The observation relied on is this:

> "Suffice it to say that there appears to be considerable difference of opinion among the Judges both in the State and Federal Courts as to whether or not the rejection of evidence obtained by illegal means depends on certain articles in the American Constitution."

Suffice it to say that we have no provision in the Indian Constitution corresponding to the Fourth Amendment in the Constitution of the United States. In fact, learned Counsel for the petitioner has not been able to invite the attention of this Court to any particular article in the Indian Constitution which the admission of

1. (1965) 2 I.T.J. 178.
2. L.R. (1955) A.C. 197.
3. (1861) 8 Cox. C.C. 498.

such evidence has violated. In my view, therefore, the assessment orders are not vitiated, merely because the account-books or other records seized were relied on in support of them.

The petitions are dismissed.

R.M. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. P. CHANDRA REDDY, *Chief Justice* AND MR. JUSTICE P. S. KAILASAM.

O. R. Abdul Rahim and others .. *Petitioners**

v.

Income-tax Officer and another .. *Respondents.*

Income-tax Act (XI of 1922), sections 24-B and 26 (2)—Legal representatives or successors—Mode of assessment and extent of liability—Returns filed by legal representatives—Completion of assessment on that basis—Recovery of tax from the estate—Balance of tax due—Recovery personally against the legal representatives, as successors to business of deceased—Whether competent—Distinction between liability of legal representatives and successors.

On the death of *R* who was doing business in Malaya, before complying with the notice issued to him under section 22 (2) of the Act, his sons (executors and trustees appointed under the will), filed the returns and the assessments were completed on the estate as represented by the sons. The Department was able to realize only a part of the tax due from the estate of the deceased in the hands of the sons, and for the balance sought to proceed against them personally as successors under section 26 (2) of the Income-tax Act. The sons applied under Article 226 of the Constitution to quash the recovery proceedings taken against them to recover the balance.

Held, that in the circumstances the sons of the deceased cannot be proceeded against personally as successors for the realisation of the tax balance due.

Section 24-B of the Act enacts a legal fiction extending the legal personality of the deceased for the duration of the entire previous year in which he died, with the consequence that the income earned by him before his death and that received by his legal representatives in that year could be subjected to tax in the relevant assessment year.

Section 26 of the Act enables the Department to make a successor in business of a deceased person an assessee in his individual capacity, and, if this is done, personal liability attaches to the assessee. If this enabling provision is resorted to it is open to such a successor to proceed against the estate of the deceased for realizing the amount that is personally recoverable from him.

But when once the assessment is initiated and completed under section 24-B by assessing the estate of the deceased in the hands of the legal representatives as such, the Department would be precluded from invoking section 26 (2) of the Act to assess the legal representatives in their personal capacity as successors in business. The only remedy available to the Department is to collect the tax from the estate of the deceased only.

Petitions under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavits filed therewith the High Court will be pleased to issue writs of prohibition prohibiting the Respondents therein from proceeding further in the matter of recovery of arrears of Income-tax due by the deceased O. Rahman Sahib in pursuance of the proceedings in G. I. 745/r/ arrears dated 2nd July, 1963, in respect of the assessment years 1950-51 and 1951-52 on the file of the 1st Respondent herein and also prohibiting the 2nd Respondent herein from acting under any notice or communication purporting to have been issued by the 1st Respondent under the Indian Income-tax Act.

V. Srinivasan, R. Balasubramania Iyer and *T. Martin*, for Petitioners.

V. Balasubrahmaniam, Standing Counsel, on behalf of Respondents.

The Judgment of the Court was delivered by

Chandra Reddy, C. J.—These Writ petitions involve the interpretation of sections 24-B and 26 (2) of the Indian Income-tax Act. The question to be decided by us arises in the following circumstances. One Rahiman Sahib was carrying on business at Singapore, Johore and Kota Tingi in the Federated Malay States. He died on 5th October, 1950, leaving behind him a will dated 10th July, 1939 with

* W.P. Nos. 738 and 781 to 783 of 1963. 16th February, 1965.

a codicil executed on 18th June, 1947. Under the will, he appointed his three sons as his executors and trustees. The codicil provided, *inter alia*, for the division of the profits of the foreign business amongst the legal heirs in the shape of allowances, remuneration and share of profits. In respect of the profits and gains derived by the said Rahiman Sahib from his business for the years 1950-51 and 1951-52, notices were issued to him under section 22 (2) of the Act; but, before they could be complied with, Rahiman Sahib died, consequently, his legal representatives filed returns, disclosing incomes, which were exigible to tax of Rs. 29,724-15-0 for the year 1950-51 and Rs. 2,314-2-0 for the year 1951-52, *i.e.*, from 1st April, 1949 to 6th October, 1950. On the basis of these returns, assessments were made on the estate of the deceased, represented by his sons. The assessments for 1950-51 and for the subsequent year were completed on 12th March, 1951 and 15th February, 1956, respectively. Thereafter, the revenue authorities could realise a sum of Rs. 9,387-8-3 from the estate of the deceased. For the balance, the Department proceeded against the properties of the petitioners by a resort to section 26 (2) of the Act. Since these amounts were not paid by the petitioners, succession certificates were issued under section 46 (2) of the Act, when the District Collector, to whom the certificates were issued, sought to recover the amounts under the Revenue Recovery Act. The jurisdiction of this Court was invoked under Article 226 of the Constitution.

In these petitions, a contention is raised that, as the assessments were made under section 24-B of the Indian Income-tax Act, the legal representatives of the deceased, Rahiman Sahib, could not be made personally liable for the tax due from his estate. It is urged that the Department could not have recourse to section 26 (2) of the Act, having made the assessment under section 24-B, and that the remedy of the Department is the one provided in section 24-B. On the other hand, it is maintained for the Department that section 26 is available to them, since the petitioners had succeeded to the business of Rahiman Sahib.

Before we deal with the merits of these relative contentions, we can profitably read sections 24-B and 26 (2) of the Act, with the interpretation of which we are concerned here. Section 24-B runs thus :

"(1) Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge, the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died.

(2) Where a person dies before the publication of the notice referred to in sub-section (1) of section 22, or before he is served with a notice under sub-section (2) of section 22 or section 34 as the case may be, his executor, administrator or other legal representative shall, on the serving of the notice under sub-section (2) of section 22 or under section 34, as the case may be, comply therewith, and the Income-tax Officer may proceed to assess the total income of the deceased person as if such executor, administrator or other legal representative were the assessee.

(3) Where a person dies, without having furnished a return which he has been required to furnish under the provisions of section 22, or having furnished a return which the Income-tax Officer has reason to believe to be incorrect or incomplete, the Income-tax Officer may make an assessment of the total income of such person and determine the tax payable by him on the basis of such assessment, and, for this purpose, may by the issue of the appropriate notice which would have had to be served upon the deceased person had he survived, require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might, under the provisions of sections 22 and 23, have required from the deceased person."

It may be incidentally mentioned that the instant case falls within the scope of sub-section (3).

Now, we will turn to the terms of section 26 (2) which run thus :

"Where a person carrying on any business, profession or vocation has been succeeded in such capacity by another person, such person and such other person shall, subject to the provisions of sub-section (4) of section 25, each be assessed in respect of his actual share, if any, of the income, profits and gains of the previous year :

Provided that, when the person succeeded in the business, profession or vocation cannot be found, the assessment of the profits of the year in which the succession took place up to the date of succession, and for the year preceding that year shall be made on the person succeeding him in like manner and to the same amount as it would have been made on the person succeeded or when the tax in respect of the assessment made for either of such years assessed on the person succeeded

cannot be recovered from him, it shall be payable by and recoverable from the person succeeding, and such person shall be entitled to recover from the person succeeded the amount of any tax so paid."

Indubitably, the income that is made exigible to the tax was earned by the person succeeded.

Now the question that falls to be determined is whether the proviso to section 26 (2) is attracted to the case so as to make the petitioners personally liable for this tax. It is not disputed that the latter part of the proviso is inapplicable, because the assessment was not made during the lifetime of the deceased person. So, the only problem that has to be solved is whether the first part of the proviso comes into operation in this case A reference to the terms of this part of the proviso clearly discloses that it is only in cases where a person succeeds to the business of another and the assessment is made in regard to the income of the person who succeeds in his capacity as a successor that the proviso comes into play. Could it be postulated in this case that the assessment was made on the petitioners herein as successors to the business of Rahiman Sahib? In other words, were the assessments made on these persons as successors of Rahiman Sahib?

We have to answer this question in the negative, having regard to the terms of the assessment orders. It appears from these orders that it was the estate of Rahiman Sahib as represented by these persons that was treated as the assessee. This is made clear in paragraph 3 of the counter-affidavit of the respondents. The relevant recital therein is as follows :

"The assessments for the above years were made on O. R. Abdul Hameed, one of the sons of the deceased, as the legal representative of late O. Rahiman Sahib on the basis of returns filed by him on behalf of other legal representatives representing the estate of the deceased."

In such a situation, we cannot accede to the submission on behalf of the Department that it was in their personal capacity that the heirs of Rahiman Sahib were assessed in respect of the income derived by the deceased, Rahiman Sahib.

It is, no doubt, true that section 26 of the Act enables the Department to make a successor in business of a deceased person an assessee in his individual capacity, and, if this is done, personal liability attached to the assessee. If this enabling provision is resorted to, it is open to such a successor to proceed against the estate of the deceased for realising the amount that is personally recoverable from him. But such a situation has not arisen in this case. As we have already stated, it is not in their individual capacity that the heirs of Rahiman Sahib were assessed on the income derived by the deceased, Rahiman Sahib. From the terms of the assessments, we could gather that the assessments were made under section 24-B of the Act, which has already been extracted. If, as mentioned above, the heirs were not made assessees in their individual capacity but in their representative capacity, that is, as the legal representatives of Rahiman Sahib, undoubtedly, it is section 24-B that would govern the case.

It is true that, ordinarily, it is only a living person that would be an assessee under the Indian Income-tax Act and a deceased person or his estate cannot be treated as an assessee. But section 24-B has enacted a legal fiction, extending the legal personality of the deceased for the duration of the entire previous year in which he died, with the consequence that the income earned by him before his death and that received by his legal representatives in that year could be subjected to tax in the relevant assessment year.

As remarked earlier, the Department had recourse to this section for the purpose of bringing to tax the profits and gains received by the assessee, and realised a portion thereof. It is only when they failed to collect the balance of the amount that the Department sought to put into effect section 26 (2) of the Act (as could be seen from the relevant orders issued by the Department). In our considered judgment, once the assessment was completed under section 24-B, it is not competent for the Department to resort to section 26 (2) for the purpose of collecting it from the heirs of the deceased, Rahiman Sahib. Having initiated proceedings under section

24-B and completed the assessment thereunder, they are precluded from invoking section 26 (2). If the assessments were made under section 24-B, the liability of the legal representatives is confined to the estate of the deceased in their hands. In other words, they could be required to pay the tax out of the estate of the deceased, without incurring any personal liability.

This position becomes clear not only from the language of the two sections, but also from the authoritative pronouncements of the Supreme Court in *Additional Income-tax Officer* v. *E. Alfred*[1], *First Additional Income-tax Officer* v. *T. M. K. Abdul Kassim*[2], and *Commissioner of Income-tax* v. *Amarchand N. Shroof*[3]. In these cases, the scheme of section 24-B of the Act is dealt with, and the proposition is laid down that, in the three eventualities contemplated by that section, the liability of the legal representatives, though, by a legal fiction, the legal representatives are deemed to be assessees, is limited to the estate in their hands, although the income was not derived by them, but by the person whose estate they represent. The instant case is governed by the doctrine of the above decisions.

On this discussion, it follows that the petitioners cannot be proceeded against personally for the realisation of the tax due, the only remedy available to the Department being to collect the tax from the estate of the deceased.

It is fairly conceded by the Counsel for the appellants that it is open to the Department to proceed not only against the properties standing in the name of the deceased but also against the properties acquired with the assets of the deceased. We are not here concerned with the question as to what are the properties that were thus purchased, since no attempt was made by the Department to attach any of the properties belonging to the petitioners as having been purchased with the assets of the deceased.

For the reasons given above, we allow these writ petitions and grant relief as indicated above. The petitioners will get costs from the Department in W. P. No. 738 of 1963. Counsel's fee Rs. 250.

V.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

Messrs. A. M. Safiulla & Co., Periamet, Madras-3 .. *Petitioner**

v.

The State of Madras, represented by the Assistant Commercial Tax Officer III, Madras City .. *Respondent.*

Madras General Sales Tax Act (*I of* 1959), *sections* 31 *and* 32—*Scope of section* 32—*Assessment order resulting in no tax liability not communicated to assessee—Such order if can be revised under section* 32—*Exercise of revisional jurisdiction under section* 32—*Limitations.*

The Deputy Commissioner exercising the powers of revision under section 32 of the Madras General Sales Tax Act (I of 1959) is not entitled to revise an order of an assessing authority where the latter has not communicated the order of assessment to the assessee though the order of assessment has not resulted in any tax liability consequent upon the net turnover being determined as nil. In other words, the powers of revision under section 32 cannot be exercised where the original order of assessment sought to be revised has not been communicated to the assessee whether or not such order has resulted in tax liability.

Section 32 (2) (*a*) of the Madras General Sales Tax Act provides that the revisional powers under section 32 shall not be exercised if the time for appeal against the order sought to be revised has not expired and under section 31 an assessee has got a right of appeal even in the case of a nil assessment. Taking the plain language of section 31 there is no reason why the right of appeal should be restricted only to orders of assessment resulting in tax liability. The right of appeal is given to the assessee whenever he is adversely affected or prejudiced by any proceedings or action taken by the assessing authority. Under the scheme of the assessment of sales tax an assessee can well claim to be adversely affected or prejudiced by an order of the assessing authority even though the order is one of nil assessment. The

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1. (1962) 2 S.C.J. 156 : (1962) 2 An.W.R. (S.C.) 54 : (1962) 2 M.L.J. (S.C.) 54.
2. (1962) 46 I.T.R. 149.
3. (1963) 1 S.C.J. 411 : (1963) 1 I.T.J. 224.

* T.C. No. 26 of 1963. 27th August, 1964.

recognition of a right of appeal in such a case necessarily carries with it a right to the decision of assessing authority being communicated. If the order is not communicated to the assessee it is impossible to conceive how he can exercise the right of appeal because he can show cause against the order of assessment only when it is communicated. Hence in a case where an order of assessment has not been communicated to the assessee the time for preferring an appeal would not have commenced at all and *a fortiori* the time for preferring an appeal against the order would not have expired and so in such a case the bar in section 32 (2) (*a*) would prevent the Deputy Commissioner from exercising his powers of revision under section 32.

In the case of an assessment completed and signed by the assessing authority the order of assessment can be communicated to the assessee without any time-limit but no liability would arise till such communication. The limitation for the assessee to prefer either an appeal or revision would commence to run only after the order is communicated to him. But so far as the Department is concerned, it would become final and effective as if communicated to the assessee and the order can be revised or varied only subject to the provisions of the Sales Tax Act; the time for exercising powers of revision would commence to run from the date of the order itself and there cannot be an enlarged period of limitation merely because the Department takes its own time to communicate the order. This is on the principle of the maxim *actus curiae neminem gravabit* (an act of Court shall prejudice no man). Thus the powers of revision under section 32 of the Madras General Sales Tax Act (I of 1959) cannot be exercised unless the order of assessment is communicated but the maximum limit of time within which the powers of revision can be exercised is four years from the date of the order as provided by section 32 (2) (*c*).

The argument that if the order of the assessing authority is not communicated to the assessee, it would only amount to a "proceeding recorded" within the meaning of section 32 (1) and that the bar in section 32 (2) (*a*) would not apply to such a case as an appeal would lie under section 31 only in respect of an order passed by the assessing authority and not in respect of mere recording a proceeding, cannot be accepted. The assessee's right of appeal which would operate as a bar to the exercise of the powers of revision cannot be defeated by the negligence or the omission on the part of the Department to communicate the order of assessment. The words "proceeding recorded" cannot possibly be equated to an order of assessment not communicated.

Petition under section 38 of the Madras Act I of 1959, praying the High Court to revise the order of the Sales Tax Appellate Tribunal, Madras, dated 18th September, 1962 and made in Tax Appeal No. 847 of 1961, assessment year 1954-55 in S.M.R. No. 25/61-62, dated 13th July, 1961 on the file of the Deputy Commissioner (C.T.), Madras Division (Assessment No. A-4/565/54-55 and A-8-609/54-55, dated 12th October, 1959, on the file of the Assistant Commercial Tax Officer III, Madras City).

C. Venkataraman, for Petitioners.

K. Venkatasami, for Government Pleader (*A. Alagiriswami*), for Respondent.

The Order of the Court was pronounced by

Ramamurti, J.—The main and the substantial point raised on behalf of the assessee, the petitioner in this revision petition, relates to the question as to whether the Deputy Commissioner exercising the powers of revision under section 32 of the Madras General Sales Tax Act of 1959 (referred to as the Act in this judgment), is entitled to revise the order of the assessing authority where the latter has not communicated the order of assessment to the assessee.

The assessee, Messrs. A. M. Safiulla & Co., are dealers in hides and skins. In respect of the year of assessment 1954-55, the Assistant Commercial Tax Officer by his order, dated 12th October, 1959, held that in view of the decision of the Madras High Court in *Noor Mohammed's case*[1], no portion of the turnover was liable to assessment to sales tax, as the petitioner was a *non-licensee*. As the order of assessment did not result in any tax liability, consequent upon the net turnover being determined as *nil*, this order of the Assistant Commercial Tax Officer was not communicated to the assessee and no demand under section 8-B (2) or 3 (2) of the Act of 1939 was issued to the assessee. After the decision of the Supreme Court, in *State of Madras* v. *M. A. Noor Mohammed & Co.*[2], reversing the decision of the Madras High Court referred to above the Deputy Commissioner of Commercial Taxes, after complying with the necessary formalities and after issue of notice to the assessee exercised his powers of revision under section 32 of the Act. By his order, dated 13th July, 1961, he held that the assessee was liable to pay sales tax on a net

1. (1956) 2 M.L.J. 374.
2. (1961) 1 S.C.J. 30 : (1961) 1 M.L.J. (S.C.) 51 : (1961) 1 An. W.R. (S.C.) 51 : (1961) 1 S.C.R. 148.

turnover of Rs. 15,62,076-15-4 at 3 pies per rupee for the assessment year 1954-55. The assessee preferred an appeal to the Sales Tax Appellate Tribunal but without any success.

Even though several points were urged before the Tribunal, learned Counsel confined himself to the question of the jurisdiction of the Deputy Commissioner while acting under section 32 of the Act. Arguments before us both on behalf of the assessee, as well as on behalf of the State were addressed on the footing that the provisions of the Act of 1959 would govern the instant case. We are also of the opinion that that is the correct position in view of the fact that the order of assessment itself was passed on 12th October, 1959 after the Madras Act I of 1959 (Madras General Sales Tax Act of 1959) had come into force and further the Deputy Commissioner exercised his powers of revision in July 1961.

Section 32 of the Act runs as follows :—

" *Section* 32.—*Special powers of the Deputy Commissioner* : (1) The Deputy Commissioner may, of his own motion, call for and examine an order passed or proceeding recorded by the appropriate authority under section 12, section 14, section 15, or sub-sections (1) and (2) of section 16 and may make such inquiry or cause such inquiry to be made and, subject to the provisions of this Act may pass such order thereon as he thinks fit.

(2) The Depity Commissioner shall not pass any order under sub-section (1), if—

(*a*) the time for appeal against the order has not expired ;

(*b*) the order has been made the subject of an appeal to the Appellate Assistant Commissioner or the Appellate Tribunal, or of a revision in the High Court ; or

(*c*) more than four years have expired after the passing of the order.

(3) No order under this section adversely affecting a person shall be passed unless that person has had a reasonable opportunity of being heard."

The relevant portion of section 31, relating to the right of appeal of the assessee runs as follows :—

" *Section* 31 : *Appeal to the Appellate Assistant Commissioner* :—(1) Any person objecting to an order passed by the appropriate authority under section 12, section 14, section 15, sub-sections (1) and (2) of section 16, section 18, section 23, section 27, sub-section (4) of section 41, or sub-section (3) of section 42, may, within a period of thirty days from the date on which the order was served on him and in the manner prescribed, appeal against such order to the Appellate Assistant Commissioner having jurisdiction :

Provided, that the Appellate Assistant Commissioner may admit an appeal presented after the expiration of the said period if he is satisfied that the appellant has sufficient cause for not presenting the appeal within the said period :

Provided further that in the case of an order under section 12, section 14, section 15, or sub-sections (1) and (2) of section 16 no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable as the case may be............"

It may be relevant to set out the corresponding provisions of the Act of 1939 regarding the right of appeal and powers of revision. Section 11 of the Act of 1939 (relevant portion) is as follows :—

" *Section* 11 : Any assessee objecting to an assessment made on him under section 9, sub-section (2) may within thirty days from the date on which he was served with notice of the assessment, appeal to such authority as may be prescribed :

Provided that the appellate authority may admit an appeal preferred after the period of thirty days aforesaid, if the authority is satisfied that the assessee had sufficient cause for not preferring the appeal within that period :

Provided further that no appeal shall be entertained under this sub-section unless it is accompanied by satisfactory proof of the payment of the tax admitted by the appellant to be due or of such instalments thereof as might have become payable, as the case may be.........."

Section 12 (2) of the Act of 1939 runs thus :

" *Section* 12 (2) : The Deputy Commissioner may (i) *suo motu*, or (ii) in respect of any order passed or proceeding recorded by the Commercial Tax Officer under sub-section (1) or any other provision of this Act and against which no appeal has been preferred to the Appellate Tribunal under section 12-A, on application, call for and examine the record of any order passed or proceeding recorded under the provisions of this Act by any officer subordinate to him, for the purpose of satisfying

himself as to the legality or propriety of such order, or as to the regularity of such proceedings, and may pass such order with respect thereto as he thinks fit......................"

Learned Counsel for the petitioner urged the following points: (i) Before the Deputy Commissioner could exercise his powers of revision under section 32 there should be a legal valid order of assessment of the assessing authority, and that in this case there is no such order of the assessment, as the assessing authority has not communicated his order of assessment to the assessee. The communication of the order of assessment to the assessee is a necessary foundation for the exercise of revisional jurisdiction by the Deputy Commissioner. (ii) The condition provided under section 32 (2) has not been satisfied as the time for the assessee to prefer an appeal against the order of assessment has not expired. Under section 31 of the Act the assessee has got a right to prefer an appeal to the Appellate Assistant Commissioner having jurisdiction within a period of 30 days from the date on which the order in question was served on him. In this case as the order has not been communicated, the time for preferring an appeal had not commenced to run at all and *a fortiori* the time for preferring an appeal against the order had not expired. In other words, if the right of appeal to the assessee is still subsisting and available to him, there is a prohibition, as it were, against the Deputy Commissioner in exercising his revisional jurisdiction.

On behalf of the State, the learned Government Pleader urged the following contentions: (*a*) For an order of assessment to be valid and operative, it is not necessary that the same should have been communicated to the assessee, that the Act and the Rules do not contemplate any service of the order of assessment upon the assessee, and that the provisions merely required a service upon the assessee, of a demand notice mentioning the particulars of the tax due from and payable by the assessee. In any event, no communication is necessary in the case of an order of assessment which determines the turnover as *nil*, resulting in no tax liability. When the order does not affect the rights of the assessee and when it is completely in his favour there is no need to communicate to him. (*b*) The assessee cannot claim to be aggrieved by an order of *nil* assessment and he has no right of appeal against such an order and so the condition specified in section 32 (2)(*a*) "*the time for appeal against the order has not expired*" has no application with the result that the bar in section 32(2)(*b*) does not apply and the Deputy Commissioner can exercise his powers of revision. When there is no right of appeal to the assessee in a particular situation, there can conceivably be no question of the time for preferring an appeal against the order not having expired. (*c*) If the order of the assessing authority has not been communicated to the assessee, it would only be *a proceeding recorded* by the assessing authority, and the Deputy Commissioner can well exercise his powers of revision. The condition that the time for appeal against the order should not have expired would not apply to such a situation as the matter is only in the stage of a "*proceedings recorded*" and could not be viewed as an order of assessment passed by the assessing authority, so long as it is not communicated to the assessee. In other words the consequence of accepting the argument of the assessee, that the necessary condition of a valid order of assessment is its communication to the assessee, is that there might be no order of assessment but nevertheless it will be a "*proceeding recorded*" by the assessing authority, which can be revised by the Deputy Commissioner under section 32.

In the course of his arguments he relied upon the decision of a Bench of this Court in *Periasami* v. *State of Madras*[1], a decision rendered under sections 12 (1), (4) and (5) of the Act of 1939.

The question as to whether an assessee has got a right of appeal in this case of a *nil* assessment may be considered first, as it has got an important bearing upon the other points urged by Counsel on both sides. Section 31, amongst other things, confers a right of appeal upon any person objecting to an order passed by the appropriate authority under section 12. Section 31 does not speak of an order of assess-

1. (1962) 2 M.L.J. 157 : I.L.R. (1962) Mad. 667.

ment, but the language employed is general, namely, "*an order passed by the appropriate authority under section* 12". Section 11 of the Act of 1939 provided that an assessee objecting to an assessment made on him under section 9, sub-section (2) may prefer an appeal within thirty days from the date of the service of the notice of the assessment. Taking the plain language of section 31, there is no reason why the right of appeal should be restricted only to orders of assessment resulting in tax liability. If the assessee can reasonably feel aggrieved or prejudiced by any portion of an order passed by the assessing authority under section 12, he will be entitled to prefer an appeal under section 31. In such cases the test would be to find out whether the assessee has been adversely affected by the order of the assessing authority. The principle of the decisions rendered under section 96, Civil Procedure Code, that where the formal adjudication, namely, the decree, is in favour of a particular party such a party will have no right of appeal under section 96 cannot be applied to decisions of assessing authorities or other quasi-judicial tribunals as the right of appeal under section 96, Civil Procedure Code, is intimately connected with the question of *res judicata* arising under section 11. Even under section 96, in some cases, the view has been taken that under particular circumstances of the case a party may have a right of appeal even though the formal adjudication, *i.e.*, the decree is in his favour, if it can be postulated that he would be adversely affected by the judgment. The important question is always whether the party can be said to be adversely affected and so aggrieved by the decision in question. In *Ebrahim Aboobaker and another* v. *Custodian-General of Evacuee Property*[1], a case arising under the Administration of the Evacuee Property Act, the question arose whether a party is entitled to prefer an appeal under section 7 from the order of the Custodian, and the Supreme Court held that when a person is given a right to raise a contest in certain matter and his contention is negatived then he is certainly a person aggrieved by the order disallowing his contention.

In dealing with a return submitted by an assessee, the assessing authority may have to consider various aspects, and the decision by the assessing authority may prejudicially affect the assessee either for that very year of assessment or for assessment in future. The assessee may be interested in establishing in his favour the incidents of a particular transaction: (*a*) as merely amounting to an agency transaction, the assessee acting merely as a buying agent; (*b*) a transaction is either in the course of import or export or an inter-State transaction; (*c*) the assessee may claim certain deductions; (*d*) the assessee may claim that a particular article comes under a particular serial number of the Schedule or either he is liable to sales tax at a particular rate or at a particular point of transaction of sale or purchase; (*e*) the assessee's accounts may have been rejected as spurious or the determination of the gross turnover as having a bearing upon the computation of the licence fee. It is unnecessary to multiply instances of the variety of circumstances, as under the scheme of the assessment of sales tax, an assessee can well claim to be adversely affected or prejudiced by an order of the assessing authority even though the order is one of a *nil* assessment. The right of appeal which is a valuable right should not be restricted or curtailed unless the language of the section clearly warrants such a restricted view. In a recent judgment in *Mohamed Sulaiman & Co.* v. *Deputy Commissioner of Commercial Taxes*[2], Veeraswami, J., took the view that in certain conceivable cases the assessee may have a right of appeal as a person aggrieved by the order of the assessing authority fixing the turnover at a certain figure even though the ultimate order of the assessing authority resulted in no tax liability. In our opinion, with respect that is the correct view of the scope of section 31, and we are not inclined to accept the general argument in the abstract, that whatever may be the contents, findings, or the reasonings of the assessing authority, the assessee will have no right of appeal if the order is a *nil* assessment.

In this connection the difference in language between section 11 of the Act of 1939 and section 31 of the Act of 1959 which confers a right of appeal should be

1. (1952) S.C.J. 483 : (1952) S.C.R. 696.
2. (1964) 2 M.L.J. 245 : I.L.R. (1964) 1 Mad. 438.

noticed. Under section 11 of the old Act a right of appeal was confined only to an order under section 9 of the old Act. But under the present Act a right of appeal is conferred in respect of orders of assessment and miscellaneous orders like an order for production of account books under section 41, or establishment of check posts or barrier and inspection of goods while in transit under section 42 of the Act. A perusal of the several sections referred to in section 31 shows that under the scheme of the Act of 1959 a right of appeal is given to the dealer or the assessee whenever he is adversely affected or prejudiced by any proceedings or action taken by the assessing authority.

The question next arises whether it is obligatory upon the assessing authority to communicate the order to the assessee and what legal consequence flow if it is not so communicated. Once the principle is accepted that the assessee has a right of appeal whether or not the order of the assessing authority results in a tax liability, considerations which apply to an order resulting in a tax liability regarding the necessity for the communication of the order would equally apply to the case of a *nil* assessment. The recognition of a right of appeal to the assessee necessarily carries with it a right to the decision of the assessing authority being communicated. The period of thirty days for filing an appeal by an assessee commences to run only from the date on which the order is served upon him. This shows that it is obligatory on the Department to serve the order upon the assessee. The relevant rules which deal with the machinery for the assessment under the Assessment Rules of 1939 do not expressly provide for the communication of the original order of assessment. *Vide* rule 11, sub-rules (2) and (3) and rule 13, sub-rule (6) of 1939. Sub-rule (7) of rule 13 only provides for the net result of the tax liability being communicated to the assessee. In the case of an appeal and revision however there is specific provision for communication of the order passed in appeal or revision. *Vide* rule 15.

Provisions substantially of the same pattern are contained in rule 15, sub-rule (5), rule 16 and rule 18, sub-rule (7) of the Madras General Sales Tax Rules of 1959. Here again there is no specific provision for communication of the order of assessment. But there is only provision for communication of the determination of the tax liability. Rule 19 contains a specific provision that if the assessing authority determines the turnover at a figure different from that shown in the return, he shall record his reasons briefly in writing and furnish to the assessee a copy of such record. From these provisions it does not necessarily follow that the communication of the order of assessment is not necessary and that a service of a demand as per Form No. B alone is sufficient. If the order of the assessing authority is not communicated to the assessee, it is impossible to conceive how he can exercise the right of appeal because he can show cause against the order of assessment only when he knows what it contains. The same considerations apply to the power of revision under section 33. It stands to commonsense that the assessee cannot show cause against the proposed revision unless he knows what the original order of assessment is and how the revising authority proposes to revise the order. This necessarily postulates that the assessee must know as completely as possible all the details of the order of assessment, and that only then he can have an effective and adequate opportunity of showing cause against the revision.

Even though to facilitate collection of tax provisional assessments are made the exact tax liability which is due and payable by the assessee gets determined only after the assessment is complete. Even though there is no limit of time within which the assessment should be completed once it is completed, the liability of the assessee would arise only when the order is communicated to him. An order of assessment though completed and signed by the assessing authority, if not communicated to the assessee, does not exist in the eye of law, so far as the assessee is concerned. In our opinion, the process of assessment under the Sales Tax Act which would result in an enforceable tax liability is complete only when the order of assessment is communicated to the assessee. But this does not mean that so far as the assessing authorities are concerned they can ignore every action taken because the order of assessment had not been communicated.

While determining the true scope of the appellate powers of the appellate authorities under section 31 and the revisional powers of the Deputy Commissioner and the Board of Revenue under sections 32, 33 and 34, it is important to bear in mind that those authorities cannot indirectly exercise such powers when they cannot directly do so. Again it must not be overlooked that under the scheme of the Act once the assessing officer has passed a final order on the return of the assessee, and determined the assessable net turnover after applying his mind to the details and the particulars contained in the return, and has also signed the order, from the point of view of the assessee, a finality has been secured and there can be no variation or revision of that order except to the limited extent permitted by the Act and in accordance with the basic principles of natural justice. In *Commissioner of Income-tax, Bombay* v. *Khemchand Ramdas*[1] dealing with the valuable right accruing to the assessee out of the finality of an order of assessment under section 23 (4) of the Income-tax Act the Privy Council put the matter thus : (at page 498-499) :

> " It had been argued on behalf of the appellant that the Act nowhere imposes any limit of time within which an assessment under the provisions of sections 23 and 29 is to be made, and that the service of the notice of demand can, therefore, be made at any time. This is true. It had, in effect, been so determined by this Board in the case of *Rajendra Nath Mukerjee* v. *Income-tax Commissioner*[2]. But it is not true that after a final assessment under those sections has been made the Income-tax Officer can go on making fresh computations and issuing fresh notices of demand to the end of all time.
>
> It is possible that the final assessment may not be made until some years after the close of the fiscal year. Questions of difficulty may arise and cause considerable delay. Proceedings may be taken by way of appeal and cause further delay. Until all such questions are determined and all such proceedings have come to an end there can be no final assessment. But when once a final assessment is arrived at, it cannot, in their Lordships' opinion, be re-opened except in the circumstances detailed in sections 34 and 35 of the Act (to which reference is made hereafter) and within the time limited by those sections. In the present case the liability of the respondents both for income-tax and for super-tax was determined by the Income-tax Officer on 17th January, 1927. In the order made by him on that date he assessed the respondents to income-tax at the maximum rate, but as the respondents were at that time a registered firm he held, as he was bound to hold, that no super-tax was to be levied. On some date before the end of March, 1927, he served on the respondents a notice of demand for the tax that he had determined as properly leviable. The assessment having been made under section 23 (4) no appeal lay in respect of it. The assessment of the respondents was therefore final both in respect of income-tax and super-tax. Their liability in respect of both taxes had been finally determined, and none the less because the question of their liability to super-tax had been determined in their favour. It was indeed, contended before their Lordships that the assessment could not be regarded as having been determined inasmuch as the Commissioner might at any time, and apparently after any lapse of time however long, cancel the registration of the respondents as a registered firm and so subject the respondents to liability to pay super-tax. Their Lordships would, in any case, hesitate long before acceding to a contention that would lead to so extravagant results. In their opinion, however, the contention cannot prevail. The Commissioner's powers under section 33 can only be exercised subject to the provisions of the Act, of which the provisions in section 34 and 35 are in this respect of the greatest importance."

With a view to prevent unnecessary harassment and hardship that would arise in protracted and delayed assessment proceedings the Legislature has made special provisions prescribing definite periods of time within which the officers administering taxation laws should take action against the assessee in dertermining the tax liability. If the statute specifies a particular time within which the powers of revision can be exercised after the passing of the original order the time cannot be indefinitely enlarged by communicating the order to the assessee at any time the Department likes. If it should be held that from the point of view of the Department also the same rule should apply and that time for exercising the powers of revision would commence to run only from the date of communication of the order it will lead to the startling and curious result that by not communicating the order to the assessee, the Department will have unlimited period of time to exercise the powers of revision. Such a view is not only opposed to the scheme of the Act but violates all principles of justice. In such cases the maxim *actus curiae neminem gravabit* (that an act of Court shall prejudice no man) (Broom's *Legal Maxims*) (tenth edition, page 73) which is founded on justice and good sense will be clearly applicable. As observed by the Supreme Court in a recent judgment there is no principle of law which is

1. L.R. 65 I.A. 236 : (1938) 2 M.L.J. 115: I.L.R. (1938) Bom. 487 (P.C.) (499, 498).
2. L.R. 61 I.A. 10 : 66 M.L.J. 121 : (1933) I.L.R. 61 Cal. 285 (P.C.).

more well settled for the guidance of the Court than the one that no act of Court could harm a litigant or a party and it is bounden duty of the Court to see that if a person is harmed by a mistake or omission of a Court the party should be restored to the position he would have occupied but for the mistake or omission of the Court. Applying this maxim it should be held that from the point of view of the assessee as against the Department the order should be deemed to have been communicated and the power of revision would come to an end after the expiry of the time limit.

The assessee should not be prejudiced by the delay of the Department in communicating the order. After the lapse of the prescribed time limit the power of revision would come to an end even though the order had not been communicated to the assessee.

To sum up in the case of an assessment completed and signed by the officer, but not communicated to the assessee, our conclusions are as follows: (*a*) The order of assessment can be communicated to the assessee without any time limit but no liability would arise till communication; (*b*) The limitation for the assessee to prefer either an appeal or a revision would commence to run only after the order is communicated to him; (*c*) So far as the Department is concerned it would become final and effective as if communicated to the assessee and the order can be revised or varied only subject to the provisions of the Act; (*d*) The time for exercising powers of revision would commence to run from the date of the order itself and there cannot be an enlarged period of limitation merely because the Department takes its own time to communicate the order.

The important changes effected in the relevant provisions in the Act of 1959 also clearly confirm this view. Under section 12 of the old Act as regards the commencement of the period of limitation there was no difference between a right of appeal or revision exercised by the assessee, and the powers of revision exercisable by the Deputy Commissioner or the Board of Revenue. In all cases under section 12 (4) and (5), limitation would commence to run from the date when the order was communicated to the assessee. But under the Act of 1959 time would commence to run in the case of an appeal or a revision filed by an assessee only from the date when the order in question is communicated to him. *Vide* sections 31 and 33. But in the case of powers of revision time would commence to run from the date of the passing of the order. *Vide* section 32 (2) (*c*) and section 34 (2) (*c*). This difference is made for the obvious reason that so far as the Department is concerned the revisional authority can always call for the records of the assessing authority and exercise powers of revision. It should be noticed that even this difference is only for the purpose of limitation. But so far as the jurisdiction to exercise the powers of revision is concerned the condition for the communication of the order should always be satisfied. In other words the powers of revision cannot be exercised unless the order is communicated but the maximum limit of time within which the powers of revision can be exercised is four years from the date of the order. Both the conditions must be concurrently satisfied: (*a*) the original order of assessment must have been communicated to the assessees; and (*b*) the powers of revision should be exercised within the time limit of four years.

On this portion of the case the learned Government Pleader placed considerable reliance upon the Bench decision of this Court in *Periasami* v. *State of Madras*[1]. In our view that decision and the reasonings contained therein will have no application to the instant case which is governed by the provisions of the Act of 1959. With great respect to the learned Judges we have some doubts about the correctness of some of the observations which were *obiter* contained in that decision. In that case the Assistant Commercial Tax Officer passed the order of assessment on 28th December, 1954, but did not communicate the order to the assessee as it was a case of a *nil* assessment resulting in no tax liability. The Commercial Tax Officer exercising his powers of revision under section 12 revised the assessment and fixed the turnover at Rs. 54,029-15-6 by his order dated 18th September, 1958. On

1. (1962) 2 M.L.J. 157 : I.L.R. (1962) Mad. 667.

behalf of the assessee it was contended that after the expiry of the time limit of three years prescribed under section 12 (4) (*a*) the Commercial Tax Officer had no authority to exercise his powers of revision. Jagadisan, J., delivering the judgment on behalf of the Bench rejected this plea holding that time would commence to run only from the date of the communication of the order and as admittedly there was no such communication the Commercial Tax Officer could not be said to have acted in transgression of the time limit prescribed by section 12 (4). In rejecting the assessee's contention the learned Judge compared the provisions of the Sales Tax Act with the provisions of the Indian Income-tax Act and held that under the scheme of the Income-tax Act time would begin to run from the date of the order even though there was no communication but that under the Sales Tax Act the scheme was different. The learned Judge put the matter thus : (at page 670).

> "It is interesting to note that the provisions of sections 12 (4) and 12 (5) of the Madras General Sales Tax Act are sharply in contrast with the provisions of section 33-A and section 33-B of the Indian Income-tax Act which provide a revisional jurisdiction to the Commissioner of Income-tax. Section 33-A, quoting the relevant words prescribing limitation, is as follows :—
>
> 'Provided that the Commissioner shall not revise any order under this sub-section if.........
> (*c*) the order has been made more than one year previously.'
>
> Section 33-B which empowers the Commissioner to revise the order of the Income-tax Officer prescribes the period of limitation in the following way : 'No order shall be made under sub-section (1)...............after the expiry of two years from the date of the order sought to be revised'."

This view based upon the analogous provisions of the Income-tax Act may not be quite correct. Perhaps the attention of the learned Judges was not drawn to the recent judgment of the Supreme Court in *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer*[1] in which the Bench decision of this Court in *Muthia Chettiar* v. *Commissioner of Income-tax, Madras*[2] was referred to with complete approval.

In *Muthiah Chettiar* v. *Commissioner of Income-tax, Madras*[2] the question arose under section 33-A (2) of the Income-tax Act. In that case the Income-tax Officer passed his order of assessment on 4th February, 1948, and the assessee filed an application for revision before the Commissioner of Income-tax under section 33-A (2) on 18th February, 1949, which was rejected *in limine* by the Commissioner on the ground that it was filed more than one year after the date of the order. The assessee's contention was that he was served with the order of assessment only on 24th February, 1948, and the period of limitation would, therefore, commence to run only from that date. The Bench took the view that even though section 33-A (2) required the assessee to file the application for revision within one year from the date of the order the provision should be understood as giving a period of one year to the assessee from the date of communication of the order. In other words the Bench held that the words "*date of the order*" should be understood as *the date of the communication of the order*. In taking this view the Bench followed an earlier decision of this Court in *Swaminathan* v. *Letchmanan*[3] in which the question arose under section 77 of the Indian Registration Act, under which any person claiming the registration of a document may institute a suit in the Civil Court within thirty days after the Sub-Registrar had passed the order refusing to register the document. There the suit was filed more than thirty days after the date of the Sub-Registrar refusing registration but within thirty days from the date of service of that order upon the plaintiff. The Bench held that limitation would commence to run only from the date of the communication of the order.

Venkatasubba Rao, J., took the view that there can be no valid order unless it is made after notice to the parties affected by it or it is communicated to them and that a contrary view would be opposed to reason and principle. It was also held that if the order is made without previous notice and communication, it would not be operative. The other learned Judge Madhavan Nair, J., concurred in that view and held that the words "*making an order*" in section 77 meant not merely the recording of the order of refusal in writing but communicating it to the party

1. (1962) 1 S.C.R. 676 : (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An.W.R. (S.C.) 10.
2. (1951) 1 M.L.J. 417 : I.L.R. (1951) Mad. 815.
3. (1929) 59 M.L.J. 585 : I.L.R. 53 Mad. 491.

concerned so as to bind him by it. Rajamannar, C.J., delivering the judgment in *Muthiah Chettiar* v. *Commissioner of Income-tax, Madras*[1] explained the position thus at page 818 :

"The only question that we have to decide is as to whether there is anything in the reasoning of the learned Judges in *Secretary of State for India in Council* v. *Gopisetti Narayanaswami Naidu*[2] and *Swaminathan* v. *Letchmanan*[3] which makes the application of the rule laid down by them dependent on the provisions of a particular statute. We think there is none. On the other hand, we consider that the rule laid down by the learned Judges in the above two decisions and we are taking the same view is based upon a salutary and just principle, namely, that if a person is given a right to resort to the remedy to get rid of an adverse order within a prescribed time, limitation should not be computed from a date earlier than that on which the party aggrieved actually knew of the order or had an opportunity of knowing the order and therefore, must be presumed to have had knowledge of the order."

In this connection it may also be mentioned that the argument based upon difference in the language in section 33-A (2) and section 33-A (1) was not accepted on the ground that when the Commissioner exercises his powers of revision he acts on his own motion and there was no question of the aggrieved party invoking his jurisdiction. The learned Judge took the view that the Commissioner's power to call for the record would cease with the lapse of one year from the date of the order by the subordinate authority but in a case falling under section 33-A (2) the party aggrieved who has to take the matter to the revisional authority will have one year from the date when the order is communicated to him.

In the decision in *Raja Harish Chandra Raj Singh* v. *The Deputy Land Acquisition Officer*[4] the view of the Madras High Court has been completely approved by the Supreme Court. Under section 18 (2) (*b*) of the Land Acquisition Act the party aggrieved will be entitled to file an application in the Court within six weeks from the date of the Collector's award. The question arose whether limitation would commence to run from the date of the award or from the date of the communication of the award. The Supreme Court held that the "*date of the award*" should be understood as the *date of the communication of the award* of the Collector, on the ground that the relevant clause should not be construed in a literal or mechanical sense. The matter was put thus at page 683 :

"Thus considered the making of the award cannot consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector ; it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it, it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression "*the date of the award*" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to section 18 in literal or mechanical way."

While emphasising the duty of the Collector to communicate the award to the party concerned the Supreme Court observed that it would be a very curious result that the failure of the Collector to discharge his obligation to communicate the order should directly tend to make ineffective the right of the party to make an application under section 18. The conclusion of the Court was stated in these terms at page 687 :

"These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned."

In view of the foregoing discussion it must be held that it is only the communication of the order which would start the running of time. Further we are also

1. (1951) M.L.J. 417 : I.L.R. (1951) Mad. 815.
2. (1910) I.L.R. 34 Mad. 151.
3. (1929) I.L.R. 53 Mad. 491 : 59 M.L.J. 585.
4. (1962) 1 S.C.J. 696 : (1962) 2 M.L.J. (S.C.) 10 : (1962) 2 An.W.R. (S.C.) 10 : (1962) 1 S.C.R. 676.
5. I.L.R. (1962) Mad. 667 : (1962) 2 M.L.J. 157.

of the opinion that the observation in *Periasami* v. *State of Madras*[1] will not help the case of the State as that decision arose under the Act of 1939 which did not contain the provision that the Deputy Commissioner shall not exercise his powers of revision if the time for appeal against the order of the assessing authority had not expired. There can be no doubt whatsoever that if section 12 of the Act of 1939 contained a corresponding provision the Bench would have held that so long as the order was not communicated the power of revision could not be exercised.

Lastly, learned Government Pleader contended again placing reliance upon the observations at page 673 in *Periasami* v. *State of Madras*[1] that if the order of the assessing authority is not communicated to the assessee, it would only amount to a "*proceeding recorded*" and that the bar in section 32 (2) (*a*) would not apply as an appeal would lie under section 31 only in respect of an order passed by the assessing authority and not in respect of mere recording of a proceeding. These observations relied upon by the learned Government Pleader are only by way of *obiter dicta* as the main ground of the decision was based upon the scope of section 12 sub-sections (4) and (5). Even otherwise the scope of these observations should be understood with reference to the provisions of section 12 and cannot govern the instant case arising under section 32 of the new Act. So far as the assessing authority is concerned the order is complete as soon as he has signed the same and the delay or omission on the part of the Department to communicate the same cannot be taken advantage of by the Department. The obligation to communicate the order cannot be circumvented or evaded by the Department and a power of revision exercised in contravention of section 32 (2) (*a*). The assessee's right of appeal which would operate as a bar to the exercise of the powers of revision cannot be defeated by the negligence or the omission on the part of the Department to communicate the order of assessment. The contention put forward by the learned Government Pleader would place the assessee completely at the mercy and caprice of the Department. We have no hesitation in rejecting this argument as of no substance, and it is directly contrary to the scheme of section 32. The words "*proceeding recorded*" cannot possibly be equated to an order of assessment not communicated.

For all these reasons we allow the Revision Petition, setting aside the order of the Appellate Tribunal. No costs.

V.K. *Petition allowed.*

[FULL BENCH]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN, MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE P. S. KAILASAM.

The Deputy Inspector-General of Police, Western Range, Coimbatore, and others .. *Appellants**

v.

P. Amalanathan .. *Respondent.*

Madras District Police Act (*XXIV of* 1859), *sections* 9, 10, *Police Standing Order* 90 (3) (*b*), *Constitution of India*, 1950, *Articles* 309, 310 *and* 311—*Departmental enquiry against a police officer—Standing Order framed under section* 9 *of the Act—Rule requiring hearing of the case and writing of the report to be by the same officer—Rule not statutory but only administrative—Not mandatory but merely directory even if statutory—Infringement of rule—Not a justiciable right.*

Natural Justice—Departmental enquiry—Enquiry continued by the third successive officer—Application for a de novo *trial and adjournment of enquiry—Application to higher police officials rejected—Continuance of enquiry without notice to delinquent officer—Examination of defence witnesses by the enquiry officer himself in the absence of delinquent officer—Enquiry vitiated—Departmental enquiry against delinquent officer—Single proceedings—Invalidity attaching to a particular stage—Whole enquiry vitiated.*

Police Standing Order 90 (3) (*b*) which provides that the Officer appraising the evidence in a departmental enquiry, should give the personal hearing and not some other officer, is not a statutory rule but only administrative instructions intended merely for the guidance of officers when they apply the statutory rules for disciplinary action framed under section 10 of the Act. Section 9 of the Act under which the Standing Order has been framed, implies that the rules contemplated therein are rules which

1. (1962) 2 M.L.J. 157 : I.L.R. (1962) Mad. 667.

* W.A. No. 78 of 1959. 30th April, 1964.

relate to the administrative aspect of the police force and non-statutory. The infringement of such rules are not justiciable.

Even on the assumption that the rule is statutory, it is merely directory and not mandatory.

The pleasure, subject to which a public servant holds an office as expressed in Article 310 (1) of the Constitution is the individual pleasure of the President or the Governor as the case may be and this power cannot be delegated to any other authority. The only restriction in the exercise of the pleasure is the one provided in Article 311 of the Constitution.The authorities mentioned in Article 309 of the Constitution can make laws and frame rules subject to the power of the President or the Governor regulating the scope and content of the do ctrine of reasonable opportunity embodied in Article 311 of the Constitution. The violation of such rules will be justiciable. But the rules framed under Article 309 may be designd purely for the purpose of administrative guidance. The question how far these rules are justiciable depends upon the fact whether such rules are merely directory or mandatory.

The findings of the Officer who conducts the enquiry in preliminary stage are not conclusive so far as the delinquent officer is concerned. These can be differed from or accepted according to the decision of the punishing authority and it is his opinion based upon the findings of the enquiry officer and the representations of the delinquent officer thereon, that is really binding and conclusive. This shows that the requirement in the Standing Order that the officer who holds the oral enquiry should himself write the report or minute of the findings must be deemed to be only of a directory character and not mandatory.

The departmental enquiry against an officer must be treated as a single and entire proceeding leading up to the findings against him. If that enquiry involved a stage where the proceedings were vitiated, it will not be proper to speculate that what had happened during the invalid stage was not material and that what had happened prior to the invalid stage would be sufficiently material to support the findings of guilt of the delinquent officer and consequently the order of dismissal against him.

Where there are number of charges against a delinquent officer and some of them are proved and some of them are held to be not proved it is open to the High Court in writ proceedings to hold that the order of punishment would be valid even on the basis of the charges found proved. But this principle cannot be extended by breaking up the enquiry itself into portions and ignore a stage of the enquiry that must be treated as invalid, and rely on the evidence elecited at the anterior stage where the enquiry was valid.

In the instant case at a certain stage of the enquiry, the delinquent officer applied to the enquiry officer (third officer to continue the enquiry) for a *de novo* enquiry stating that if his request was not granted then he would apply to the higher authorities. Though the enquiry was adjourned by one month and the Deputy Inspector-General refused to order a *de novo* enquiry, the enquiry officer without notice to the delinquent officer, proceeded to complete the enquiry by himself examining witnesses cited for the defence. The enquiry is vitiated on this ground.

Appeal under clause 15 of the Letters Patent against the Order of Rajagopalan, J., dated the 11th day of November, 1958, and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition No. 1516 of 1956 presented under Article 226 of the Constitution of India to issue a writ of *certiorari*, calling for the records relating to the Order of the Deputy Inspector-General of Police, Western Range, Coimbatore, dated 4th December, 1955, passed in the minute of the Deputy Superintendent of Police, Mettur, in R. C. No. 27011/PR/53 as confirmed by the Inspector-General of Police, Madras, by his order Reference S.R.I. No. 1454 of 1954, dated 22nd September ,1954 and G.O. Ms. No. 2316, Home, dated 14th August, 1956, passed by the Government of Madras and quash the same and grant costs of this petition.

The Advocate-General (*V. K. Thiruvenkatachari*) for the appellants.

K. K. Venugopal for respondent.

(This Writ Appeal coming on for hearing in the first instance before *Anantanarayanan* and *Venkatadri, JJ.*, the following order of Reference to the Full Bench, was delivered by

Anantanarayanan, J.—In this appeal by the State of Madras, we are concerned with the allowance by Rajagopalan, J., of a petition for the issue of a writ of *certiorari* by the respondent (P. Amalanathan), a Sub-Inspector in the Police Department, who was dismissed by orders of the Inspector-General of Police and the Government, upon charges framed and held established by the appropriate authorities. We are not now called upon to decide many of the points in controversy, which have been adverted by Rajagopalan, J., and discussed during the course of his judgment. There is a single ground before us, and the following background of facts will be adequate to elucidate this issue, as well as the necessity that has now arisen for a Reference to Full Bench.

Very briefly stated, the enquiry into the charges against the respondent was commenced by one Mr. M. V. Rao, the then Assistant District Superintendent of

Police, Hosur, in December, 1952. It is not in dispute that by March, 1953 this Officer had examined as many as 36 witnesses, for what may be broadly termed the prosecution. At that stage, Mr. Rao was replaced by another officer, Mr. Balasundaram, who on 15th April, 1953, served a notice on the respondent, intimating him (respondent) that the enquiry was to be continued, and that the respondent should state whether he required an altogether *de novo*, enquiry. It is not in dispute that the respondent replied that he did not require any such *de novo* enquiry. At this stage, itself, it may be convenient to notice the explanation which the respondent requires us to take into consideration, in understanding his communication. According to the respondent, he had cited most of the prosecution witnesses as defence witnesses, so that in any event, they would be summoned again for effective cross-examination at a later stage. It was for this reason that the respondent dispensed with a *de novo* enquiry.

However this might be, it is not in dispute that the succeeding officer, Mr. Balasundaram, did not actually examine any witnesses, and was not able to do so. He was succeeded by Mr. Rangabashyam, and Mr. Rangabashyam continued the enquiry, without holding any *de novo* enquiry, completed it *ex parte* (under the circumstances of abstension from the proceedings by the respondent, which need not be gone into now) and submitted his minute to the higher authorities.

These are the main facts. It was contended before Rajagopalan, J., that, apart from the other grounds of justification for the issue of a writ of *certiorari*, the proceedings before Mr. Rangabahsyam lacked jurisdiction altogether, being in violation of Police Standing Order 90 (3) (*b*). It is necessary for the purpose of this discussion to briefly set forth the history of that rule.

As it originally stood, this was introduced by an amendment as Note 2 at page 57, Police Order No. 244, Volume I (Reprint 1926). In the following terms :

"The officer who writes the minute, *i.e.*, who appraises the evidence, should give the personal hearing and not some other officer."

The Government Order (Ms. No. 175) cites a letter from the Inspector-General of Police, and authorises this amendment. Later by Government Order Ms.No. 1335, dated 29th April, 1946, the words "*oral enquiry*" were substituted for the words "*personal hearing*" found in this rule. The interpretation of this precise rule was the subject of a review petition before Rajamannar, C.J., and Panchapakesa Ayyar, J., in Civil Miscellaneous Petition No. 10486 of 1956, Writ Appeal No. 51 of 1955. After setting forth the rule, the learned Chief Justice observed that, though the rule might not be couched in good English, the sense was clear, namely, that the Officer who holds enquiry must write the minute, and not some other officer. The Bench was of view that, in this interpretation the option of the accused to demand or to waive a *de novo* hearing was immaterial, and did not affect the substance of the objection. Where the minute was written by an officer who had not held the enquiry throughout, or held the enquiry *de novo* commencing from the first witness, the minute contravened the rule, so that the subsequent order of dismissal *was vitiated by a lack of jurisdiction*. In the instant case Rajagopalan, J., appears to have felt considerable doubt about the correctness of the view taken by the Bench, and he refers to certain arguments of the learned Additional Government Pleader for a contrary view, with which he was apparently in concurrence. But, as a single Judge, he felt himself bound, by the view of the Division Bench and, issued the writ. He has observed, in this context :

"It may be that these are factors to be taken into account should the matter come up before a Division Bench on appeal even in this case."

The questions before us are, therefore, two-fold in character. Firstly, there is the question of interpretation of this rule 90 (3) (*b*) in relation to the given facts. On this matter, there is a difference of view between the Division Bench, and the point of view urged by the learned Advocate-General before us, which also apparently secured the concurrence of Rajagopalan, J., as his individual opinion. Secondly, there is the question, equally important if not more so, whether on the assumption that this is a statutory rule, the violation of it *per se* can give rise to inter-

ference in writ jurisdiction, apart from any infringement of Article 311 (2) or of the principles of natural justice. Before framing these two questions for Reference to a Full Bench, we think that it is but right and proper that we should, briefly, notice the arguments upon either side, that have been urged in this matter at some length before us.

Even before doing that, we might refer to a ground of objection that rule 96 (3) (*b*) itself is not a statutory rule, but a purely departmental instruction, directive and not mandatory, the infringement of which can give rise to no cause of action of any kind, as far as the accused officer (respondent) is concerned. In this connection, Sri Venugopal for the respondent draws out attention to section 9 of the District Police Act (XXIV of 1859), under which apparently the rule was issued by the Government. The argument of the learned Advocate-General is that section 9 does not apply, and that the rule itself does not fall within any of the categories of power enumerated in that section. But we notice that the rule and the amendment thereto were both issued by the Government after a reference by the Inspector-General of Police. Apart from section 9, our attention has not been drawn to any specific enabling provision under which this rule could have been issued by the Government. Further, Sri Venugopal draws our attention to the fact that, in the printed volume of the Police Standing Orders (1938 edition), the rule is marked with as asterisk, as being statutory in character. Under the circumstances, we are of the view that the rule appears to be statutory, and it is on this assumption that the further discussion will follow.

The main point of the learned Advocate-General is that the judicial principle that he who hears must determine the cause applies strictly to operative decisions of judicial bodies and not to any acts of a purely administrative character. He stresses, that in the present case, the report or minute is purely *advisory* in the strict sense. It is part of the preparation of record. It is not binding on the disciplinary authority, who alone has the jurisdiction to decide upon the punishment. The learned Advocate-General relied upon *High Commissioner for India* v. *I. M. Lall*[1] for elucidation of this second stage in relation to an earlier stage at which the power of the disciplinary authority comes into play; his point is that any earlier minute by an officer holding the enquiry, is a purely persuasive or advisory document. *Rangachari* v. *Secretary of State for India*[2] and *Venkata Rao* v. *Secretary of State for India*[3] are also referred to. In *Dr. M. Krishnamoorthy* v. *The State of Madras*[4] the Bench of Rajamannar, C.J., and Panchapakesa Ayyar, J., observed that the fact that rules were made to safeguard the rights of a civil servant in matters of disciplinary action, did not imply that the High Court had jurisdiction to quash the relevant orders of dismissal purely because one or other of the rules had been contravened. In *Kuppuswami* v. *State of Madras*[5] Rajagopalan, J., stressed that a disciplinary Tribunal was not a judicial authority to decide either the question of guilt, or the question of punishment of the concerned officer. These powers related to the Government alone, as the ultimate authority. In *A. N. D'Silva* v. *Union of India*[6] their Lordships of the Supreme Court again have emphasised the distinction between the enquiry officer and the ultimate punishing authority. Finally, in *Sardar Kapur Singh* v. *The Union of India*[7] the following observation of their Lordships occurs at page 582:

> "The Constitution however does not guarantee an enquiry directed in exercise of any specific statutory powers of administrative rules."

In other words, either it must be shown that Article 311 (2) was contravened, in the sense that there was a denial of a fair opportunity for defence, or alternatively, it must be shown that some principle of natural justice has been contravened. Where either of these contingencies had not been established, but what has been established is the infringement of even a statutory rule of the procedure relating

1. (1948) F.C.R. 44 : L. R. 75 I.A. 225 : 1948 F.L.J. 23 : (1948) 2 M.L.J. 55.
2. L.R. 64 I.A. 40 : (1937) 1 M.L.J. 515: I.L.R. (1937) Mad. 517 (P.C.).
3. L.R. 64 I.A. 55 : (1937) 1 M.L.J. 529 : I.L.R. (1937) Mad. 532.
4. (1951) 1 M.L.J. 709.
5. (1956) 2 M.L.J. 352.
6. (1962) 2 S.C.J. 126.
7. (1960) 2 S.C.R. 569 : (1960) S.C.J. 487 : (1960) M.L.J. (Crl.) 406: (1960) 1 M.L.J. (S.C.) 116 : (1960) 1 An.W.R. (S.C.) 116.

to disciplinary proceedings, such an infringement cannot *per se* give rise to a cause of action. Hence, the fact that the minute was drawn up by an Officer other than he who held the enquiry at the initial stage, cannot give any right to the respondent to assail the order of dismissal, because the minute itself is purely advisory in character, and no question of jurisdiction can really arise. According to the arguments of the learned Advocate-General, the Bench erred in their view on this aspect.

We shall now very briefly refer to the arguments *per contra* of learned Counsel for the respondent. Learned Counsel has mainly argued that the infringement of a statutory rule whatever might be its scope, purport or, tenor, does give rise to a cause of action, provided that the rule relates to disciplinary matters within the scope of Article 311. He first relied upon *Rajagopala Ayyar* v. *Madras State*[1], in which decision Rajagopala Ayyangar, J., has referred to the non-observation of certain rules which had statutory force under Article 313 of the Constitution, and held that this necessarily led to the conclusion that the preliminary conditions, subject to which alone the notice to show cause under Article 311 (2) could have been issued, were not satisfied in the case which, in its turn, vitiated the subsequent order of dismissal. Learned Counsel also relied on *Kuppuswami* v. *State of Madras*[2] cited by the learned Advocate-General, as the Bench held that, where there was the absence of good and sufficient reason, and the punitive measure was based purely on suspicion, this affected the jurisdiction itself of the Government. Next *Gullapalli Nageswara Rao, etc.* v. *State of Andhra Pradesh*[3] was cited, for the proposition that where the Act and Rules framed thereunder imposed a duty on the State Government to give a personal hearing, divided responsibility was destructive of the concept itself. "If one person hears and another decides, then personal hearing becomes an empty formality." On this authority, it could even be held that the violation of the rule in the present case contravened the principles of natural justice.

Finally, strong stress was laid upon the judgment of the Supreme Court in *State of Uttar Pradesh* v. *Babu Ram Upadhya*[4]. In this decision, their Lordships have proceeded to the length of holding that, where a statutory rule relating to disciplinary matters *ex facie* mandatory in its terms is infringed, the resulting order of dismissal would be illegal, even apart from an infringement of rights guaranteed under Article 311 (2) or of the principles of natural justice.

Consequently, in the light of these citations and arguments by the respective parties before us, we frame the following two questions for Reference to a Full Bench, the first because of substantial doubt concerning the correctness of the interpretation of rule 90 (3) (*b*) by the Division Bench in Civil Miscellaneous Petition No. 10486 of 1956 in Writ Appeal No. 51 of 1955, and the second, because of the intrinsic importance of the question itself in the light of the authorities. The two terms of Reference will, therefore, be as follows:

"1. Whether the provision in the Police Standing Order No. 90 (3) (*b*), namely, 'The Officer who writes the minute, namely, who appraises the evidence, should give oral enquiry and not any other office' implies (on the assumption that it is a statutory rule) that the entire proceedings, namely, the recording of the evidence of the witnesses, the hearing by the Officer and the drafting of the minute or report should be conducted and made by the same person or merely means that the person who ultimately drafts the minute or report should not do so without giving a personal hearing to the delinquent officer, though he might not have himself examined every one of the witnesses?

2. Upon the assumption that rule 90 (3) (*b*) is a statutory rule, relating to disciplinary proceeding, does the violation of such provision *per se* involve the necessary results that the final order of punishment is void, irrespective of whether the Officer was given a reasonable opportunity of defending himself, or the proceedings were in conformity with the principles of natural justice."

We consequently direct that the papers might be placed before our Lord The Chief Justice for being posted before a Full Bench.

The appeal then came on for hearing before the Full Bench. (*Srinivasan, Ramakrishnan* and *Kailasam, JJ.*)

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1. A.I.R. 1955 Mad. 182.
2. (1956) 2 M.L.J. 352.
3. (1959) S.C.J. 53 : (1960) 1 An.W.R. (S.C.) 13 : (1960) M.L.J. (S.C.) 13 : (1960) 1 S.C.R 580.
4. (1961) 2 S.C.R. 679.

The Additional Government Pleader (*V. Ramaswami*), for Appellants.

K. K. Venugopal, for Respondent.

The Judgment of the Court was delivered by

Ramakrishnan, J.—This Writ Appeal is directed against the order of Rajagopalan, J., in Writ Petition No. 1516 of 1956, presented under Article 226 of the Constitution. It was filed by one P. Amalanathan, who was a Sub-Inspector of Police. On complaints received that he was corrupt a departmental enquiry was undertaken against him, on the basis of sixteen charges. The details of the procedure at the departmental enquiry will be considered at length later in this judgment. At this stage, it will suffice to note that the preliminary enquiry which involved the examination of witnesses, was conducted by three Officers one after the other. The last of them Sri Rangabashyam prepared a detailed report, (or minute as it is called) embodying his findings on the charges, and submitted them to the Deputy Inspector-General of Police the authority empowered to punish the Sub-Inspector of Police under the departmental rules. He was dismissed from service by the Deputy Inspector-General of Police. His appeal to the Inspector-General of Police was dismissed and a further representation to the Government was also rejected on 14th August, 1956. The petitioner filed a Writ Petition for the issue of a writ of *certiorari* under Article 226 of the Constitution for the quashing the order of dismissal on two principal grounds, *viz.*, (i) During the departmental enquiry as a whole, the petitioner was denied a real and effective opportunity to defend himself against the charges; (ii) Mr. Rangabashyam, Deputy Superintendent of Police, who completed the enquiry, had no jurisdiction to draw up the minute which furnished the basis for the order of dismissal. His action was in contravention of Police Standing Order No. 90 (3) (*b*). This, Writ Petition came before Rajagopalan, J., who found on a consideration of the allegations and counter-allegations that ground No. 1 was not substantiated. In regard to ground No. 2, the petitioner relied in support on a decision of a Bench of this Court consisting of Rajamannar, C.J., and Panchapakesa Ayyar, J., in Writ Appeal No. 51 of 1955. The gist of the Police Standing Order is that the officer who conducts the preliminary enquiry should himself write the minute (the report of his findings) on the basis of which the punishing authority, *viz.*, the Deputy Inspector-General of Police has to pass appropriate orders of punishment. In the present case as well as in the case which came up before the Bench in Writ Appeal No. 51 of 1955, more than one officer has conducted the preliminary disciplinary enquiry. Therefore, the officer who drew up the minute (report of the findings) was not the officer who was in charge of the enquiry throughout. In such circumstances, the learned Chief Justice in the Bench decision afore cited held :

"......the dismissal of the petitioner was vitiated by a lack of jurisdiction in the Deputy Superintendent of Police, Nagapattinam, to complete the enquiry against petitioners and write the minute on the strength of which the petitioner was dismissed."

Rajagopalan, J., felt himself bound by the aforesaid decision and quashed the dismissal order.

An appeal was filed by the respondents in the Writ Petitions, the Deputy Inspector-General of Police, Coimbatore, the Inspector-General of Police, Madras and the State of Madras and this came up before a Bench of this Court consisting of Anantanarayanan, and Venkatadri, JJ. The learned Judges summarised the rival contentions urged before them and found that the dispute had to be resolved by a Reference to a Full Bench, because they entertained a substantial doubt concerning the correctness of the interpretation of Police Standing Order No. 90 (3) (*b*) by the Division Bench in Writ Appeal No. 51 of 1955; and also because the matter itself was of intrinsic general importance. They formulated the terms of Reference thus :

" 1. Whether the provision in the Police Standing Order No. 90 (3) (*b*), namely, the Officer who writes the minute, namely, who appraises the evidence, should give oral enquiry and not any other officer implies (on the assumption that it is a statutory rule) that the entire proceedings, namely, the

recording of the evidence of the witnesses, the hearing by the officer and the drafting of the minute or report, should be conducted and made by the same person, or merely means that the person who ultimately drafts the minute or report should not do so without giving a personal hearing to the delinquent officer, though he might not have himself examined every one of the witnesses ?

2. Upon the assumption that rule 90 (3) (*b*) is a statutory rule, relating to a disciplinary proceeding, does the violation of such provision *per se* involve the necessary result that the final order of punishment is void, irrespective of whether the officer was given a reasonable opportunity of defending himself, or the proceedings were in conformity with the principles of natural justice."

Though only the two terms formulated as above have been referred to the Full Bench, since the entire appeal is also now before us, we proceeded to hear the appeal both with reference to the points thus referred to us for decision, as well as the correctness of the orders of Rajagopalan, J., on the first point set down by him for decision, *viz.*, whether the departmental enquiry was itself vitiated, because no effective opportunity was given to the respondent in the appeal to defend himself and thus there was violation of the principles of natural justice.

We will take up first for consideration the two points in the order of Reference by Anantanarayanan, and Venkatadri, JJ., and which have been extracted above:

It is a well-known practice in almost all the administrative departments in this State (presumably in other States also) to maintain what is known as Standing Orders for the guidance of the subordinate officers. Thus, we have the Board's Standing Order for the guidance of the Revenue Department, Collector's Standing Orders for the guidance of revenue officers in individual districts, and in the Judicial Department we have the High Court's Circular Orders and Rules of Practice. The Madras Police Standing Orders have been similarly issued from time to time for the guidance of officers in the Police Department. Police Standing Order No. 90 (3) (*b*), before subsequent amendment, read as follows, at the time when the respondent was dismissed from service :

"The Officer who writes the minute, that is, who appraises evidence, should give the oral enquiry and not some other officer."

We will briefly refer to the prior history of this Standing Order. In the 1926 edition of the *Police Order Book*, Volume I, the appropriate rule for dealing with punishments of subordinate police officers were contained in rules 227 to 248. But at the time a rule similar to Police Standing Order No. 90 (3) (*b*) is not found. The present Standing Order had its origin in a G.O. No. 175, Public (Political), dated 1st April, 1932. The Inspector-General of Police wrote to the Government on 18th March, 1932, suggesting an amendment to Order 244 in the 1926 edition of the *Police Order Book*, Volume I by adding the proviso :

"The Officer who writes the minute, *i.e.*, who appraises the evidence, should give the personal hearing and not some other officer."

This letter of the Inspector-General of Police itself purports to be in pursuance of an earlier confidential memorandum of the Government, dated 7th March, 1932. We were shown by the learned Additional Government Pleader a copy of this memorandum, in which the Government pointed out some irregularities in the disposal of a charge against a Sub-Inspector and observed that it would be desirable that the officer who writes the minute, *i.e.*, who appraises the evidence should give the personal hearing and not some other officer. The Government in the G.O. above cited approved the proposal and issued the amendment. The Standing Order thus issued read :

"The officer who writes the minute, *i.e.*, who appraises the evidence, should give the personal hearing and not some other officer."

The Standing Order in the above terms could well imply, that it would suffice if a personal hearing is given to the delinquent officer, by the officer who writes the minute, but it may not be necessary that the officer who writes the minute should be the one who conducted the enquiry against the delinquent officer throughout. But in 1946, the order underwent a substantial alteration and it was recast in the form mentioned already. This amendment was made in pursuance of a letter from the Inspector-General of Police to the Government, dated 23rd January, 1946,

and thereupon the Government, by its order, G.O. No. 1335, Home, dated 29th April, 1956, substituted the words *oral enquiry* for the words *personal hearing or regular enquiry* wherever they occurred in the order. Thereafter, the order in the form it stood at the time of the dismissal of the respondent, emerged. As pointed out by the learned Judges who disposed of Writ Appeal No. 51 of 1955, the wording of the order thus amended is inelegant. While the predicate *give* can appropriately be used in regard to *personal hearing* it cannot be the appropriate one for *oral enquiry*. The word *holds* would be more appropriate for oral enquiry. But apart from this inelegant use of language, the meaning of the Standing Order, after its amendment in 1946, is quite plain, namely, that the officer who writes the minute should be the one who was throughout in charge of the preceding preliminary departmental enquiry. If more than one officer had conducted this departmental enquiry, and the finding or minute was prepared by one of them, there would be a violation of the Standing Order, as found by the Division Bench.

The first question pressed on us for consideration by the learned Additional Government Pleader is that this Standing Order is not a statutory rule, but that it partakes the character only of administrative instructions. The relevant statutory enactment for consideration is Act XXIV of 1859. Section 9 of that Act reads thus :

"The Inspector-General may, from time to time, subject to the approval of the State Government frame such orders and regulations as he shall deem expedient, relative to the general Government and distribution of the force, the places of residence, the classification, rank and particular service of the members thereof, their inspection, the description of arms, accoutrements and other necessaries to be furnished to them, to the collecting and communicating intelligence and information and all such other orders and regulations relative to the said Police force as the said Inspector-General shall, from time to time, deem expedient for preventing abuse or neglect and for rendering such force efficient in the discharge of all its duties."

Section 10 of the Act reads thus :

"Subject to the provisions of Article 311 of the Constitution and to such rules as the State Government may, from time to time make under this Act, the Inspector-General, Deputy Inspector-General and District Superintendents of Police may at any time dismiss, suspend or reduce to a lower post, or time-scale, or to a lower stage in time-scale, any officer of the subordinate police whom they shall think remiss or negligent in the discharge of his duty or otherwise unfit for the same and may order the recovery from the pay of any such police officer of the whole or part of any pecuniary loss caused to Government by his negligence or breach of orders."

The language of section 10 clearly shows that the rules framed by the State Government under that section relate to the punishment of subordinate police officers for negligence of duty and other reasons. The reference to Article 311 of the Constitution in that section also reinforces this inference. Section 9 also enables rules to be passed thereunder having statutory force. But the language of that section indicates that the rules framed thereunder do not cover the punishment or disciplinary action against subordinate police officers. The words used in section 9 imply that the rules contemplated therein are rules which relate to the administrative aspect of the police force.

We were shown the original Government Order of the year 1932, which led to the framing of Police Standing Order No. 90 (3) (*b*) as well as the Government Order which amended it in 1946. Though these Government Orders purport to have been issued on a correspondence which originated from the Inspector-General of Police, on issuing the orders in question, the Government do not purport to exercise their statutory power under section 9. A perusal of the several provisions in the Police Standing Orders shows that many of them are of an administrative nature. The margin gives the Government Order in which the instructions were issued. It is quite likely that the Government in exercise of their administrative control over the Police Department have issued orders from time to time, and that the more important of these orders found their way into the Police Standing Orders.

Reference was made by the learned Counsel for the respondent, to Note 2 (1) of the Prefatory Note of the Madras Police Standing Orders to the effect that orders marked with asterisk are issued by the Inspector-General of Police under section 9 of the Madras District Police Act, 1859 (XXIV of 1859), with the approval of the

Government. Order 90 retains an asterisk in the margin. But one cannot be quite sure that these asterisks in spite of the Prefatory Note above could be used safely as the guiding factor in all cases for determining whether a rule is statutory or not. We have been shown edition of the Police Standing Order Book issued in 1950 in which Order 90 does not contain an asterisk. A perusal of several portions of Order 90 gives the impression that the order includes a great deal of material of an advisory or directory character issued from an administrative point of view for the guidance of subordinate officers and they do not appear to be worded in the formal manner which one associates with statutory orders. Thus, there are two notes under Order 90 (2) (c) (vi) and (vii) in the 1950 edition of the Madras Police Standing Orders. The note under sub-clause (vi) is to the effect that . . . .

"in grave cases it is often desirable to conduct an oral enquiry whether the delinquent wants it or not".

The Note under sub-clause (vii) is to the effect that

"every item of the charge should be carefully and accrurately framed, and that it should be remembered that an exact copy of items (i) and (iii) of Order 90 (2) (c) will have to go into the minute".

This type of instruction found in Order 90 appears to indicate that the above order was intended merely for the guidance of officers when they apply the statutory rules for disciplinary action, framed under section 10 of the Madras District Police Act, and which are embodied in Annexure III of the Police Standing Orders. It is also necessary to point out that Order 90 (1) makes a reference to Annexure III, as containing the procedure to be followed for imposing the penalty of reduction, suspension, etc., and thereafter it proceeds to give several instructions for the guidance of the Officers who have to apply the statutory rules contained in Annexure III. Another item of intrinsic evidence furnished by the order itself to show its non-statutory character is the cross-reference to statutory orders found in Order 90. Thus, Order 90 (4) (*a*) (1938 edition) reads :

"From the moment the investigating officer makes up his mind to proceed against an officer, the requirement of the *statutory orders* must be observed."

In the same edition, Order 90 (4) (*d*) reads :

"It is particularly important that the formalities prescribed in the *statutory order* should be followed if the investigating officer is in the position of a prosecutor.........."

The above reference to a statutory order is *de novo* Standing Order 90. This would show that Order 90 does not itself have the force of a statutory order and that the appropriate statutory orders for disciplinary purposes must be looked for outside Order 90 ; they are found in Annexure III of the book of Police Standing Orders.

Our attention was drawn to a reference to the use of the asterisk made by the Supreme Court in one of the cases *State of Andhra Pradesh* v. *Venugopal*[1] that came up before it. But in that decision apparently no attack was made as was done in this case that the asterisks themselves did not provide the essential clue for making the distinction. The Government Order under which the particular Police Order was issued did not also show that it was issued under statutory authority. In view of the discussion mentioned above, it appears to us to be safer to go to the original Government Order itself for the purpose of deciding whether a particular order in the Police Order Book is one issued under the statutory power, or whether it is merely an order which embodies an administrative direction. It will not be sufficient if the Government is shown to have issued a particular order, but it will be necessary to prove that the order was issued in exercise of the statutory power under section 9 of the Madras District Police Act. In this connection, we refer to the decision of the Supreme Court in Civil Appeal No. 453 of 1962, where a rule issued under a provision closely analogous to section 9 of the Madras District Police Act, namely, section 12 of the Central Police Act (V of 1861) was referred to, for the purpose of finding out whether certain Standing Orders in force in Uttar Pradesh should be

1. (1964) 3 S.C.R. 742 : A.I.R. 1964 S.C. 33.

deemed to be statutory orders issued under section 12 of Central Act V of 1861. Section 12 of that Act reads :

"The Inspector-General of Police may, from time to time, subject to the approval of the State Government, frame such orders and rules as he shall deem expedient relative to the organisation, classification and distribution, of the Police Force the places at which the members of the force shall reside, and the particular services to be performed by them............."

A comparison of this section with section 9 of the Madras District Police Act shows their close analogy. The Standing Order under examination in that decision, dealt with a rule providing for guidance in the matter of promotion as well as confirmation of subordinate police officers. Taking up for consideration the question whether the order, which purported to have been issued by the Inspector-General of Police, had any legal efficacy, the Supreme Court observed :

"This would depend upon the Standing Orders having been issued by a competent authority under the provisions of a statute which empowered that authority to prescribe 'conditions of service'. For undoubtedly if it were not so, it would be merely an administrative instruction issued by the Inspector-General of Police for the guidance of his officers but could not determine service conditions fixed by statutory rules by competent authorities or confer any legal rights which in the event of non-observance could be the subject of complaint in a Court."

Then, after referring to section 12 of Central Act V of 1861, the Supreme Court observed :

"It is clear that the orders and rules referred to in this section have nothing to do with the determination of the service conditions of the officers recruited to the police force."

Prima facie, bearing in mind the purpose for which section 9 of the Madras District Police Act was enacted as stated in that section itself if could not deal with framing of rules for disciplinary action, for which the relevant section is section 10 of the Act. Therefore, Order 90 (3) (*b*), which relates to disciplinary action, to have legal validity as a statutory rule, would have to be framed under section 10 of the Act. But it is not the case of either party that it was so framed. It must be considered to be only a rule of a non-statutory and administrative nature.

The next question for consideration is whether, even assuming for the sake of argument that the Order aforesaid in the Madras Police Standing Orders is a statutory order, its violation must necessarily lead to the quashing of the order of dismissal. Sri K. K. Venugopal, appearing for the respondent referred to a judgment of Ramachandra Ayyar, J. (as he then was) in an unreported decision—Writ Petition No. 1525 of 1956. In that case, the question for consideration was whether the order of Government transferring the petitioner as a Sub-Inspector of Police from the Police Service, where he was a probationer, to the Excise Service, was proper or not. Observing that probation, once commenced, could be terminated only under the rules, that the terms and conditions of the service of a probationer would be governed by the rules framed in that behalf, and that the petitioner would be entitled to the protection which those rules provide, the learned Judge held :

"The Madras District Police Act and the rules framed thereunder have statutory force, and if there is a contravention of these provisions, the officer affected would have a right to approach the Court, as the contravention of a statute or rules framed thereunder would be justiciable in the absence of any provision therein to the contrary. Even in a case where there was a mere breach of the service rules framed by the Executive Government without a violation of the constitutional safeguards, it has been held that the High Court could issue a writ to quash the order in disciplinary proceedings against an officer where the order was void."

Thereafter, the learned Judge allowed the writ petition.

A somewhat different view has been held by Rajagopalan, J., in *Sambandhan* v. *Regional Traffic Superintendent*[1], where at page 304 of the report he observed :

"...........the fact that the Executive has framed rules to regulate the conditions of service does not by itself clothe the civil servant with a right to seek the aid of the Court, when he has been wronged by violation of any of those rules. To hold that the Court has that jurisdiction would, it appears to me, constitute an inroad on the concept, that the civil servant holds office during the pleasure of the Executive, not warranted by the terms of the Constitution."

1. (1957) 2 M.L.J. 541 : I.L.R. (1958) Mad. 295 (304)

The learned Judge purported to follow earlier decisions, which he had cited in his judgment. Rajagopalan, J., also observed that the rules constitute solemn assurance on the part of the Executive that its pleasure would be exercised in accordance with the rules, but they do not bring into existence rights and obligations enforceable in a Court, and that the wrong suffered by a civil servant by any contravention of the rules has to be redressed by the Executive itself to whose pleasure the Constitution has committed him. But the above view has to be reconsidered in the light of the later decision of the Supreme Court in *The State of Uttar Pradesh* v. *Babu Ram Upadhya*[1] wherein there is an analysis of the history of what can be called, for brevity, the pleasure doctrine, in regard to the holding of office by Government servants, as evolved in the successive Government of India Acts and finally embodied in the present Constitution. The same decision also contains weighty observations whch are binding on this Court, and which relate to the effect of statutory rules framed under Article 309 of the Constitution, in the context of the pleasure doctrine enunciated in Article 310 of the Constitution. Though the learned Counsel for respondent Sri K. K. Venugopal took us through the history of the pleasure doctrine, it is unnecessary to recapitulate them in this judgment, because they have been adverted to in several decisions both of this Court as well as of the Supreme Court. But it is important to make a note of the result of the Supreme Court's decision in *The State of Uttar Pradesh* v. *Babu Ram Upadhya*[1], on the statutory principles. The Supreme Court reached two crucial conclusions, which are binding on this Court. Firstly, the pleasure, subject to which a public servant holds an office as expressed in Article 310 (1) of the Constitution, is the individual pleasure of the President in the case of Central Government servant, of the Governor in the case of a State Government servant. This power of the President or the Governor to dismiss a civil servant at pleasure, cannot be delegated to any subordinate officer and can be exercised only by the named authorities, namely, the President or the Governor. The only restriction in the exercise of the pleasure by these two authorities is the one provided in Article 311 of the Constitution ; this inference has to be spelt out from the use of the words "*except as expressly provided by this Constitution*" in Article 310 (1) of the Constitution. Secondly, so far as the rules and laws framed or enacted under Article 309 of the Constitution are concerned, they cannot override the power conferred upon the President or the Governor under Article 310 as qualified by Article 311. The authorities mentioned in Article 309, can make laws and frame rules subject to this overriding power. While so doing they can also lay down laws and frame rules regulating the scope and content of the doctrine of reasonable opportunity embodied in Article 311 of the Constitution.

This discussion would lead to the result that rules framed under Article 309 of the Constitution can include rules which are intended to regulate the scope and content of the doctrine of reasonable opportunity under Article 311 of the Constitution. The violation of such rules will be justiciable. But, rules can also be framed under the statutory power under Article 309 of the Constitution, which need not have the aforesaid object. There can be rules designed purely for the purpose of administrative guidance. The question is how far the violation of such rules will be justiciable.

This question about the justiciability of rules framed under Article 309 of the Constitution came up for consideration before the learned Judges of the Supreme Court in *The State of Uttar Pradesh* v. *Babu Ram Upadhya*[1]. Taking up the specific question of the justiciability of the rules framed under Article 309 of the Constitution, which might not fall within the category of rules regarding the scope and content of the doctrine of reasonable opportunity the learned Judges proceeded to discuss the conditions which would be necessary before the violation of such rules could be held to be justiciable. For this purpose, they applied a distinction well-known in the law of interpretation of statute, the distinction between directory and mandatory rules. Learned Counsel Sri K. K. Venugopal, appearing for the respondent,

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1. (1961) 2 S.C.R. 679.

took us through several chapters of Craies on Statute Law dealing with absolute and directory enactments. He stressed on the use of negative in the Order under consideration in this case and urged that this would provide a clue to a mandatory character. But even Craies observes that this fact cannot be laid down as a universal rule, and that while no universal rule can be laid down for this purpose, it is the duty of Courts of justice to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be construed. As pointed out by the Supreme Court in *The State of Uttar Pradesh* v. *Babu Ram Upadhya*[1]:

"..................the Court may consider, *inter alia* the nature and the design of the statute, and the consequences which would follow from construing it the one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom and, above all, whether the object of the legislation will be defeated or furthered."

Examining the Police Standing Order No. 90 (3) (*b*) under consideration, from this point of view, we note first of all, that decisions of the Supreme Court have repeatedly held that the findings of the officer who conducted the preliminary enquiry are not conclusive so far as the delinquent officer is concerned. They can be differed from or accepted according to the decision of the punishing authority. In *Union of India* v. *H. C. Goel*[2], the Supreme Court observed at page 367:

"The object of the enquiry is plain. It is to enable the Government to hold an investigation into the charges framed against a delinquent public servant, so that the Government can, in due course consider the evidence adduced and decide whether the said charges are proved or not. The interposition of the enquiry which is held by a duly appointed enquiry officer does not alter the true legal position that the charges are framed by the Government and it is the Government which is empowered to impose punishment on the delinquent public servant. Therefore, on principle, it is difficult to see how the respondent is justified in contending that the findings recorded by the enquiry officer bind the appellant in the present case."

Likewise, the Supreme Court in *Sardar Kapur Singh* v. *The Union of India*[3] at page 590 observed:

"The President of India was not bound before passing an order dismissing the appellant, to hear the evidence of witnesses. He could arrive at his conclusion on the evidence already recorded in the enquiry by the Enquiry Commissioner."

The Supreme Court followed the observation of Lord Thankerton in the Privy Council decision in *High Commissioner for India* v. *I. M. Lall*[4]:

"In the opinion of their Lordships no action is proposed within the meaning of the sub-section (section 240, clause (3)) until a definite conclusion has been come to on the charges and the actual punishment to follow is provisionally determined on. *Prior to that stage, the charges are unproved and the suggested punishments are merely hypothetical.* (*Italics ours*)."

At the same time it should be made clear that the enquiry officer is not an amanuensis regarding the deposition of witnesses. He is entitled to give his findings and the punishing authority is bound to take a note of them, but there is this over-riding qualification that the findings of the enquiry officer are supplied to the delinquent, who has got a right to make his representations to the punishing authority against those findings, and it is the conclusion reached by the punishing authority, after he had considered the findings of the enquiry officer on the one hand and the representations of the delinquent officer on the other, that is really binding aud conclusive in the case.

This shows that the requirement in the Order in question that the officer, who holds the oral enquiry, should himself write the report or minute of the findings, must be deemed to be only of a directory character, and not mandatory, because, the findings of the enquiry officer do not have a conclusive or binding effect on the punishing authority. The position in the case of such preliminary enquiries is

1. (1961) 2 S.C.R. 679 (710).
2. A.I.R. 1964 S.C. 364 (367).
3. (1960) S.C.J. 467 : (1960) M.L.J. (Crl.) 406 : (1960) 1 M.L.J. (S.C.) 116 : (1960) 1 An. W.R. (S.C.) 116 : (1960) 2 S.C.R. 569 (590).
4. (1948) 2 M.L.J. 55: (1948) F.C.R. 44, 64: L.R. 75 I.A. 225 : (1948) F.L.J. 23.

[SUPREME COURT.]

Subba Rao, Mudholkar and *Bachawat, JJ.*
12*th August*, 1965.

Sudalaimuthu Chettiar *v.* Palaniyandavan.
C.A. No. 480 of 1965.

Madras Cultivating Tenants Protection Act (XXV of 1955), *as amended by Act (XIV of* 1956), *section* 2 (*a*) *and* (*ee*)—" *Carry on personal cultivation* "—*Test—Contribution of physical labour by son-in-law holding power-of-attorney from widow and daughter of deceased cultivating tenant—Son-in-law if* " *member of family* "—*Right to deposit arrears of rent and claim protection under the Act.*

Before a person can be a cultivating tenant, he or members of his family must contribute his or their own physical labour. The supervision of panniyals could not be characterised as physical labour within the meaning of the definition of " cultivating tenant " in the Madras Cultivating Tenants Protection Act.

A person can be properly regarded as being the member of his wife's family and not merely of his father's family. So a son-in-law of a deceased tenant holding a power-of-attorney from his mother-in-law and his wife (heirs of the tenant) contributing his physical labour is sufficient to render the wife and daughter cultivating tenants " contributing physical labour of members of his family in the cultivation of that land " within the meaning of that expression in section 2 (*ee*) of the Madras Cultivating Tenants Protection Act.

[Case remitted to Sub-Collector for determining whether the son-in-law was putting in physical labour in the cultivation of the field.]

A. V. Viswanatha Sastri, Senior Advocate (*Naunit Lal*, Advocate, with him), for Appellant.

S. C. Agarwala, D. P. Singh, R. K. Garg and *M. K. Ramamurthy*, Advocates of *M/s. Ramamurthy & Co.*, for Respondents.

K.S. *Appeal allowed.*

Srinivasan, J.
5*th July*, 1965.

Rathinam Pillai *v.* Board of Revenue.
W.P. No. 1227 of 1964.

Madras Hereditary Village Offices Act (III of 1895), *sections* 6 *and* 23—*Karnam—Disciplinary proceedings—Punishment—Confirmation by District Revenue Officer in appeal—No further right of appeal or revision to Board of Revenue.*

Board Standing Order 156-*A*—*Not applicable.*

The hereditary principle of making appointments under the Madras Hereditary Village Offices Act has only been declared invalid in the light of Article 16 of the Constitution, by the Supreme Court. The remaining provisions of the Act, the mode of dealing with officers departmentally and providing for appeals from decisions affecting them, among the other provisions, continue to be in force. No further right of appeal or revision from the decision of the District Revenue Office in appeal, lies to the Board of Revenue.

Board's Standing Order 156-A occurs in the chapter which deals with matters outside the scope of the Acts and Regulations. When the case of the village officer is governed by the Act, there can be no scope for invoking Board's Standing Order 156-A.

R. Krishnamachari for *K. Parasaran*, for Petitioner.

S. Mohan, for the Additional Government Pleader.

V.S. *Petition dismissed.*

Kailasam, J. — 9th July, 1965. — Rajagopala Vaithian v. Chockalingam Chettiar. A.A.A.O. No. 41 of 1964.

Limitation Act (IX of 1908), *Articles* 180, 182 (5)—*Application for delivery of possession made by auction-purchaser—To be made within three years of sale becoming absolute—Auction-purchaser, stranger or decree-holder himself, limitation under Article* 180 *only applicable—Prior application for delivery made after three years of sale becoming absolute—Order for delivery made therein—Prior application closed for non-prosecution—Bar of* res judicata—*If applies—Subsequent application—If a continuation of the prior application.*

An application by a purchaser of immovable property at a sale in execution of a decree, whether the auction-purchaser was a stranger or the decree-holder himself, for delivery of possession must be made within three years from the date when the sale became absolute as provided under Article 180 of the Limitation Act. Article 182 (5) is not applicable to such a case.

An application for execution or for delivery of possession can be regarded as continuation of the previous application only in a case where there had been no complete disposal of the application and where the decree-holder was not responsible for the termination of such proceedings. If the previous application was not proceeded with by the default of the auction-purchaser himself, there would be no scope for the theory of continuation.

No bar of *res judicata* is applicable where from the records it cannot be said whether the direction to execute on the previous application was on the ground of non-applicability of Article 180 of the Limitation Act.

Even if the *Explanation* to section 47, Criminal Procedure Code is held to be applicable, it cannot be taken out from the purview of Article 180 of the Limitation Act.

T. S. Kuppuswami Iyer, for Appellant.

K. Raman, for Respondent.

V.S. — *Appeal allowed; No leave.*

Chandra Reddy, C.J., and *Natesan, J.* — 15th July, 1965. — Appavoo Mudaliar v. State of Madras. W.A. No. 351 of 1963.

Constitution of India, 1950, *Article* 31 (2), 31 (5) (*b*) (ii), *Madras Slum Improvement (Acquisition of Land) Act (XI of* 1954), *section* 3—*Act enacted for promotion of public health—Falls outside the scope of constitutional guarantee provided by Article* 31 (2) *as to compensation—Personal notice to owner after Government decided to acquire land overruling objections—If necessary—Sufficiency of a notification in the Gazette.*

The Madras Slum Improvement Act, enacted for the promotion of public health, and enacted before the Fourth Amendment to Article 31 (2), would fall outside the scope of Article 31 (2) by virtue of the provisions contained in Article 31 (5) (*b*) (ii) of the Constitution. By exempting laws for the promotion of public health, a wide discretion is given to the Legislature and laws which would fall within this concept are taken out of the constitutional guarantee provided under Article 31 (2), relating to the question of compensation.

[No final opinion was expressed on the contention of the State that personal service of the notice is not called for after the Government had arrived at a decision for acquiring the land overruling the objections of the owner and it would be sufficient if there is publication of the notice under section 3 (2) of the Act in the Gazette.]

K. Ramaswami, for *A. Doraiswami*, for Appellant.

Special Government Pleader, for Respondent.

V.S. — *Appeal dismissed.*

Kailasam, J.
23*rd July*, 1965.

V. N. M. M.

V. R. Subramaniam *v.*
Balasubramanya Nadar.
A.A.O. No. 233 of 1962.

Trade and Merchandise Marks Act, (1958), *sections* 9, 11, 12 *and* 109—*Marks 'Roji' and 'Raja'—Words not deceptively similar or likely to deceive or cause confusion—Word 'Roji', not a derivative from surname 'Rosie'—Identical with or deceptively similar—Likely to deceive or cause confusion—Meaning—Application for rectification—Respondent's mark registered—Contravention of sections, burden of proof on the applicant—Orders of Registrar—Appellate Court—Powers of.*

The mark 'Roji' and 'Raja' are not deceptively similar or likely to deceive or cause confusion amongst the purchasers of the goods bearing the marks.

The registration of the mark 'Roji' is not in contravention of section 9 (1) of the Trade and Merchandise Marks Act as the word is not a derivative from the surname 'Rosie' and is not closely similar to the word 'Rosie'.

Sections 12 (1) and 11 (*a*) of the Act, to some extent, cover the same field and there is some overlapping, but they are not identical.

In a case where the respondent's mark was registered the burden is on the applicant to prove that the mark violated any of the provisions of the Act and should be removed.

The powers of the appellate Court in regard to orders made by the Registrar of Trade Marks is not in any way restricted and the order of the Registrar need not be treated as sacrosanct. The appellate Court will of course take into consideration the view of the Registrar in coming to a decision in appeal.

K. P. Mahadeva Ayyar, for Appellant.

Subbaraya Ayyar, Sethuraman and *Padmanabhan*, for Respondent.

V.S.

Appeal dismissed.

Srinivasan, J.
27*th July*, 1965.

M/s. Scindia Steam Navigation Co., Ltd. *v.* Union of India.
W.P. Nos. 1386 and 1387 of 1963.

Sea Customs Act (*VII of* 1878), *sections* 20, 23—*Petitioner engaged in coastal trade—Vessel leaving Indian port, touching a foreign port en route, and return to Indian port—Ship's stores at the time of leaving Indian port and existing on return—Customs duty leviable on—Bunkering stores at foreign port—Duty on re-entry to Indian port—Not on the quantity bunkered at the foreign port but on the quantity on board the ship on re-entry.*

Under the Sea Customs Act, even if the goods had been goods which were on board the ship when she left the Indian port, when once the ship has touched a foreign port, before its return to an Indian port, it would under law be a case of an import from the foreign port and the Customs Authorities would be justified in levying duty on the entire quantity of the ship's stores. If that is the position, the case where a ship bunkered stores at the foreign port does not call for further special examination. The right to levy duty however depends upon the quantity of import into India, and not upon the quantity bunkered at a foreign port.

Some rules are desirable and the petitioners are entitled, if the law does not otherwise prohibit, to a revision of duty in respect of the goods which they carried out from the Indian port and which they brought back at the time of re-entry into the Indian port.

As the petitioner in the instant case was not prejudiced, since the levy of duty was made on a restricted quantity (less than quantity leviable under the law), this is not a proper case where a writ of any nature should issue.

K. C. Jacob, S. K. L. Rattan and *R. Srinivasan*, for Petitioner.

Additional Government Pleader, for Respondent.

V.S.

Writ refused.

Kailasam, J.
2nd August, 1965.

Kutty Nadar *v.* Swamikutty Nadar
A.A.A.O. No. 100 of 1962.

Limitation Act (IX of 1908), *Article* 182, *Travancore Registration Act, Part B States Laws Act (III of* 1951)—*Decrees of trial Court and appellate Court registered under former Part B States law—Pending second appeal, Indian laws extended—Decree in second appeal not registered—Execution—Limitation—Three years from the date of the decree in second appeal.*

It is only the final appellate decree that is operative and capable of execution. Where the decrees of the trial Court and the appellate Court were registered under the laws of the Part B State, but the decree in second appeal was not registered, it is only the decree in second appeal that is operative and capable of enforcement and if it was not registered the period of limitation for filing an execution petition would only be three years and not six years from the date of the decree in second appeal.

M. S. Dhanukodi Pillai and *V. Shanmugam,* for Appellant.

S. Padmanabhan, for Respondent.

V.S.

Appeal dismissed.
Leave granted.

Srinivasan, J.
17th August, 1965.

Thamizha Thagan *v.* Revenue Divisional Officer, Namakkal.
W.P. No. 2141 of 1965.

Madras Panchayats Act (XXXV of 1958), *section* 25 (1)—*Disqualification of candidates—Sentence of imprisonment for offence involving moral delinquency—Burning a copy of the Constitution—Sentenced for imprisonment under section* 5 *of the Prevention of Insults of National Honour Act of* 1957—*Entails disqualification for election—Right to stand for election—Not a fundamental right—Section* 25 (1)—*Validity—Not discriminatory—Act XIV of* 1957—*State Legislature competent to enact law.*

A wilful and callous disregard of the feeling of the public and, indeed, a positive injury to their feelings in the shape of a burning of a copy of the Constitution cannot but be regarded as an offence involving moral delinquency entailing disqualification for election to the panchayat.

The question of moral delinquency would be better capable of decision in the light of the facts and circumstances of each particular case and no general standard applicable to all types of cases can be laid down.

The right to stand for or to contest elections is neither a fundamental right nor a common law right. Such a right depends for its origin and exercise on the statute.

Section 25 (1) of the Panchayats Act is not invalid as being discriminatory. The classification of persons who have been convicted for offences involving moral delinquency, on the one side, and others who have not been convicted at all or have been convicted of offences not involving moral delinquency is certainly appropriate and germane to the policy underlying the Act.

Act XIV of 1957 is a valid piece of legislation within the competence of the State Legislature as falling within the entry " Public Order " in the State List and " Criminal Law " in the Concurrent List.

P. R. Gokulakrishnan, for Petitioner.

Additional Government Pleader, for Respondents 1 to 4.

K. Venkataswami for *K. Alagiriswami,* for Respondent 5.

V.S.

Petition dismissed.

Srinivasan, J.
17th August, 1965.

Satguru *v.* S. Arumugam.
W.P. No. 2204 of 1965.

Madras Panchayats Act (XXXV of 1958), *sections* 25 (1), 26, 28—*Scope—Disqualification of members—Moral delinquency—Conviction for offences under sections* 147, 324, 323 *and* 354 *of the Penal Code—Security proceedings taken under Criminal Procedure Code—If offences involving moral delinquency disqualifying the member—Determination of the question by an election petition or by the authority under section* 28 *of the Act.*

The offence of causing hurt committed in the course of a serious disturbance involving an unlawful assembly and the commission of the offence in prosecution of the common object of such an assembly, if the circumstances attendant upon the commission of the offences are such, would involve moral delinquency.

The conviction for the offence of criminal trespass, by forming into an unlawful assembly and molesting women would certainly amount to moral delinquency.

A proceeding under the security provisions of the Criminal Procedure Code is not in respect of a criminal offence, and if a person is bound over under any of those provisions, it does not amount to a conviction for an offence. Such a proceeding would not come within the scope of an offence involving moral delinquency.

The persons who can approach the prescribed authority under section 28 of the Act for determining the question of disqualification are limited to the group of members of the Panchayat or the Executive Authority. The section also indicates that it is only the question of supervening disqualification which attaches to the member subsequent to his becoming a member that would come within the scope of section 28. The prohibition contemplated in sections 25 and 26 of the Act is a prohibition against the candidate or member disqualified, under any of the provisions of the sections from standing for election, and that is a matter which can be examined either at the stage when the scrutiny of the nomination takes place or any defeated candidate or voter of the constituency challenges the election on the basis of the disqualification. An election petition and a decision by the prescribed judicial authority under section 28 operate in distinct fields.

P. R. Gokulakrishnan, for Petitioner.

T. K. Subramania Pillai, for Respondent 2.

Additional Government Pleader, for Respondents 4 and 5.

V.S. ——— *Petition dismissed.*

Kailasam, J.
26th August, 1965.

Velayutham Chettiar *v.*
Subramania Chettiar.
A.A.A.O. No. 103 of 1962.

Madras Indebted Agriculturists (Repayment of Debts) Act (I of 1955), *section* 4 (7), *Civil Procedure Code (V of* 1908), *section* 48 (1) (*b*), *Limitation Act (IX of* 1908), *Article* 182 (7)—*Decree becoming payable in instalments under the statute—Fresh period of limitation available from the date on which each of the instalments became due.*

On reading sub-section (7) of section 4 of Madras Act I of 1955 and section 48 (1) (*b*) of the Civil Procedure Code, it is clear that a fresh period of limitation is provided for from the date on which each of the four instalments becomes due under section 4 (1) of the Act. Article 182 (7) of the Limitation Act of 1908 also provides a period of three years from such date when the payment is directed to be made in an instalment decree. Whatever may be the conflict regarding the integrality of a debt, so far as a decree is concerned, a fresh period of limitation is available from the date on which each of the instalments became payable.

R. Gopalaswamy Ayyangar, for Appellant.

K. S. Desikan and *K. Raman*, for Respondent.

V.S. ——— *Appeal and memo. of objections dismissed ; No leave.*

Srinivasan and *Venkatadri, JJ.*
26*th August*, 1965.

Muthuswami Mudaliar *v.* State of Madras.
S.C.P.No. 73 of 1965 in A.S. No. 133 of 1960.

Constitution of India, (1950), *Article* 133 (1) (*c*)—*Substantial question of law—Dharkast grant of large extent of property in the possession of appellant for large number of years—Grant if absolute, or conditional liable to resumption by Government—Burden of proof—Leave granted.*

The important point for consideration was whether the darkhast grant was absolute in character or was merely a conditional one liable to be resumed by the Government. The plaintiffs were not able to produce the original grant or patta given by the Government. It is the duty of the Government to produce the original grant or patta given by the Government to the predecessor-in-title of the plaintiffs. The substantial question of law arises upon the burden of proof. When a large extent of property was given under a darkhast grant and when the party was allowed to be in the possession of the property for a long time and when the Government wanted to resume it, the question would arise as to who should prove that the grant was a conditional one. In such circumstances, the matter assumes general importance. Leave to appeal has to be granted under Article 133 (1) (*c*) of the Constitution.

R. Gopalaswami Iyengar, T. T. Srinivasan, and *A. N. Rangaswami,* for Petitioners.

T. N. C. Rangarajan, for Government Pleader, *G. Ramanujam,* for the State.

V.S.

Application allowed.
Leave granted.

Natesan, J.
3*rd September*, 1965.

Lourduswamy *v.* Mother Raphail, Superintendent, Sacred Heart Leprosy Hospital, Kumbakonam.
C.R.P. No. 1672 of 1962.

Madras Cultivating Tenants Protection Act (*XXV of* 1955), *section* 4 (5)—*Restoration of possession—Benefit only to person evicted from the land otherwise than in accordance with the Act—Person voluntarily surrendering land—Not entitled to protection.*

Registration Act (*XVI of* 1908), *sections* 17 *and* 49—*Relinquishment of managing rights only with reference to the lands—No registration necessary.*

A person cannot secure restoration of possession under section 4 (5) of the Act, if he was not forcibly evicted from the land, even if he is a cultivating tenant. The provision in section 4 (5) can be availed of by a cultivating tenant who has been evicted therefrom otherwise than in accordance with the Act. If there is no eviction or forcible dispossession and on the contrary the tenant himself has surrendered possession of the land, he cannot subsequently change his mind and claim to be restored to possession.

Where the document does not purport by its terms to terminate or extinguish or provide for the relinquishment of any leasehold right in the property much less of any outstanding term, and refers only to the management by the person of the lands in question as agent and relinquishment of such agency rights, the document does not require registration.

A surrender of leasehold interest by itself does not require any writing and in a normal agricultural lease for a fasli, the tenant if he does not intend taking a renewal leaves at the end of the season itself.

R. Gopalaswami Iyengar, for Petitioner.

M. S. Venkatarama Iyer, for Respondent.

V.S.

Petition dismissed.

Anantanarayanan, O.C.J. Abdul Razack *v.* Umapathy.
3rd September, 1965. C.R.P. No. 2000 of 1964.

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 10 (2) (ii) (*b*) *—Putting the building for different user—Fugitive and sporadic user for a very limited period—Not the test of conversion entailing eviction.*

A fugitive and sporadic user of the leased premises, for a limited period, ought not to be taken as the test of conversion to some other use inconsistent with the use contemplated by the original lease.

The tenant of premises leased as a shop, for a limited period in the absence of his wife, conducted some cooking and also stayed there, due to stringency of circumstances, though he had his residence of his own elsewhere. The record does not show that the shop was not run as a shop during the period or that the business was temporarily closed down even for a day. This would not constitute putting the leased premises to a different user entailing eviction.

S. Padmanabhan and *Habib Mohamed*, for Petitioner.

A. Subramanya Ayyar and *A. Viswanathan*, for Respondent.

V.S. *Petition allowed.*

Natesan, J. Krishnamurthy Iyer *v.* Govindaswamy Pillai.
3rd September, 1965. C.R.P. No. 567 of 1965.

Madras Panchayats Act (XXXV of 1958), *section* 25 (2) (*a*)*—Disqualification of a member on ground of leprosy—Compulsion for medical examination—District Munsif, functioning as Election Authority* persona designata, *no power to direct member to undergo medical examination—No inherent powers exercisable by Authority under section* 151, *Civil Procedure Code—Constitution of India* (1950), *Article* 227*—Revision.*

The District Munsif functioning as Election Authority under the Panchayats Act, only as *persona designata* has absolutely no jurisdiction to order compulsory medical examination of the respondent in an Election Petition.

Section 151 of the Civil Procedure Code cannot avail to support this power, because firstly the Election Court is not a Court as generally understood and secondly assuming it may have the inherent powers in procedure, the exercise of any inherent power must be consistent with sound general principles of law and it cannot override the rights of parties.

K. Gopalachari and *K. Sarvabhauman*, for Petitioner.

K. V. Venkataseshadri, for Respondent.

V.S. *Petition allowed.*

Anantanarayanan, O.C.J. Khader Shariff Sahib *v.* Kandaswami Goundar.
10th September, 1965. C.R.P. No. 980 of 1963.

Madras Cultivating Tenants Protection Act (XXV of 1955), *section* 4-*A—Application for resumption of half the extent made by the landlord—Proof of* bona fides*—Not prescribed under the Act.*

Section 4-A merely states that landlord shall be entitled to resume possession from any cultivating tenant, for purposes of personal cultivation, of land not exceeding one-half of the extent of the lands leased. There is no further criterion laid down by Act itself, about the *bona fides* or proof of a sincere intention.

If a small landholder of the kind intended to be benefited by this provision, swears, to the need, and he is an agriculturist who resides in the village, there cannot be any further proof of *bona fides*.

P. Sharfuddin, for Petitioner.

R. Ganesan, for Respondent.

V.S. *Petition allowed.*

Anantanarayanan, O.C.J.
17*th September*, 1965.

Mohamad Mustafa Maracayar *v.*
Udaianachi Ammal.
C.R.P. No. 1475 of 1965.

Civil Procedure Code (*V of* 1908), *Order* 21, *rule* 72—*Permission to decree-holder to bid and set-off—Discretion to be exercised with considerable care—Order to specify the grounds—Desirability when objections are overruled.*

In granting permission to the decree-holder to bid and set-off, the Court should act cautiously after due inquiry into all the attendant circumstances. Since it is not a matter of course, but a discretion to be judiciously exercised, it is certainly desirable that the order should specify the grounds on which the permission has been granted, particularly where the objections thereto have been overruled.

N. Sivamani, for Petitioner.

R. Gopalaswami Iyengar, for Respondent.

V.S. *Petition dismissed.*

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therefore, different from criminal trials, where one Judge is transferred and another Judge takes his place. In such a case, the accused has the right to ask for a *de novo* trial under section 350 of the Criminal Procedure Code. The implications of this right to ask for a *de novo* trial given to the accused, have been considered at length by a Full Bench of this Court in *Fernandez*, In re[1] where the question arose whether a right of *de novo* trial can be claimed by the accused in a case of trial by a special Judge and the Bench laid down the principle that except in cases where the statute made a provision for the purpose, the entire oral evidence should be heard by the Presiding Officer before he could pronounce judgment in a criminal case. But this statutory principle is applicable to cases where the binding judgment, or decision has to be given by the Officer who holds the enquiry. That there may be an appeal against his decision, is a different matter. There is a fundamental distinction between an officer who holds a preliminary departmental enquiry against a delinquent officer and submits his findings to the punishing authority with the limitation that the findings have no final or conclusive value, but are only provisional and may or may not be accepted by the punishing authority, and a Court engaged in the trial of a criminal case, which has got the power to pronounce, on the guilt of the accused and the decision, is final so far as the trial Court is concerned. Further reinforcement to the inference now drawn, that the rule is directory rather than mandatory is provided by the fact that subsequent amendments to Order 90 have treated the present provision as involving a lacuna requiring amendment. The new amended Order reads :

> "The officer who conducts the oral enquiry and appraises the evidence should ordinarily write the minute. But if for any reason the officer is not able to complete the enquiry, another officer may continue the enquiry and write the minute with the evidence so recorded by the previous officer or partly recorded by that officer and partly recorded by himself. If, however, the officer is of opinion that further examination of any of the witnesses whose evidence has already been recorded is necessary in the interest of justice, he may resummon any such witness and after such further examination, cross-examination and re-examination, if any, as he may permit the witness shall be discharged."

In other words, the requirement that the same officer should hold the enquiry and write the minute cannot in all cases, be treated as absolute, to ensure justice to the delinquent. It has to be applied only subject to reasonable safeguards. One such safeguard will be an option given to the delinquent officer to ask a *de novo* enquiry or to waive it. In the present case, it has to be pointed out that the delinquent officer waived a *de novo* enquiry at an earlier stage when there was change in the personnel of the Enquiry Officer. Only when there was a further change in the personnel of the officer and dispute arose about the order in which the P.W. 4 was to be recalled for cross-examination and the D.W. 4 had to be examined did he insist upon a *de novo* enquiry. As already pointed out the delinquent officer, unlike the accused in a criminal case, has got an opportunity to make a further representation against the findings of the Enquiry Officer when the matter comes up before the punishing authority at the final stage. The representation may include very well a representation about the inadequacy of the preliminary enquiry, or even include a necessity for a direction for a fresh enquiry. It, therefore, appears to us that as long as the findings of the officer holding the preliminary enquiry have no value as a conclusive determination of the case against the delinquent officer, the Order now under consideration should be considered to be directory rather than mandatory. We would also like to point out in this connection that when we asked the learned Government Pleader whether there is a similar provision in the rules for departmental enquiry in the case of other departments, he was not able to show us any such rule. In *State of Mysore* v. *S. S. Makapur*[2] the Supreme Court accepted the position that even a reading over of the prior statements of witnesses to the delinquent officer would satisfy the requirements of natural justice.

Learned Counsel appearing for the respondent referred to certain decisions in this connection dealing with the demeanour of witnesses. One of them is a

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1. (1958) 2 M.L.J. 294: (1958) M.L.J. (Crl.) 665 (F.B.).
2. (1963) 2 S.C.R. 943: (1963) 2 S.C.J. 104.

decision of the Gujarat High Court in *Hemaraisinhji* v. *I. G. of Police*[1] where at page 67 there was an observation to the effect that the enquiry was vitiated because the officer who had the occasion to see the witness and observe the demeanour had not written any summing up, but it was written by his successor. The first point to observe is that the Gujarat High Court had also taken into account several other irregularities in the trial including the addition of a charge at a subsequent stage and the absence of proof for one of the charges. It is after taking all these into consideration together that the Gujarat High Court set aside the decisions. Further the Gujarat High Court did not have the opportunity of reading the observations in *Union of India* v. *H. C. Goel*[2] referred to above and wherein stress has been laid on the value to be given to the findings of the officer who conducted the preliminary enquiry. Again another decision referred to by the learned Counsel for the respondent is a decision of a single Judge of the Calcutta High Court in *Amulya Kumar* v. *L. M. Bakshi*[3]. The Calcutta High Court construed the decisions of the Privy Council in *Chinchal Singh* v. *King Emperor*[4] and of the Calcutta High Court in *Sarba Ranjan* v. *Sm. Haripriya Dassi*[5] which referred to the trial of civil or criminal cases. Those decisions laid down the principle that it is an elementary right of an accused person in a criminal case, or a litigant in a civil suit, that a witness who is to testify against him should give his evidence before the Court trying the case which then has the opportunity of seeing the witnesses and observing their demeanour. The Calcutta High Court also referred to another criminal case *King Emperor* v. *Sakharam*[6] where it was held that under the Code of Criminal Procedure the Sessions Judge was not authorised to try a case partly upon evidence not recorded by himself and that he could not do so although the accused had given consent to such a course. The Calcutta High Court after noting that departmental proceedings were not governed by the Indian Evidence Act, observed that to satisfy the rules of natural justice, the officer who has to come to a conclusion as to the guilt of the delinquent, should be the same officer who heard the evidence and observed the demeanour of the witnesses. Here again, the essential distinction between a preliminary departmental enquiry where the findings are purely tentative and do not have a finding force, and a criminal or a civil case where the trial Court has got the duty to come to a conclusive decision on the dispute has not been adverted to by the Calcutta High Court. This substantial distinction between the proceedings in a civil or criminal Court on the one hand and the proceedings in a departmental enquiry on the other, has to be borne in mind when the procedure wherein the officer who held the enquiry did not write the minute, but a different officer, has been challenged as having vitiated the enquiry.

Gullapalli Nageswara Rao, etc. v. *State of Andhra Pradesh*[7] which was relied upon by the learned Counsel for the respondent in this connection, dealt with an entirely different set of circumstances. There a question arose as to the implementation of the scheme framed by the Andhra Government for a State Transport Undertaking, taking over the transport of buses to the exclusion complete or partial of other persons. The scheme provided for an enquiry followed by disposal of the objections. For carrying out the scheme, the rules framed by the Government imposed a duty on the Secretary to the Government to hear the objections and the Chief Minister to decide on the objections. The Supreme Court observed that the above divided responsibility was restrictive of the concept of judicial hearing and such a procedure defeated the object of personal hearing, that personal hearing enabled the authority concerned to watch the demeanour of the witnesses and clear up his doubts during the course of the arguments, and the party appearing to persuade the authority by reasoned arguments to accept his point of view, and that

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1. A.I.R. 1961 Guj. 63.
2. A.I.R. 1964 S.C. 364.
3. A.I.R. 1958 Cal. 470.
4. (1946) 1 M.L.J. 125: I.L.R. (1945) Lah. 451 (P.C.): L.R. 72 I.A. 270.
5. (1948) 53 C.W.N. 569.
6. (1901) I.L.R. 26 Bom. 50.
7. (1960) 1 M.L.J. (S.C.) 13: (1960) 1 S.C.R. 580 : (1959) S.C.J. 53: (1960) 1 An.W.R. (S.C.) 13.

if one person heard and another decided, then personal hearing became an empty formality. The Supreme Court then observed that the said procedure followed in the case offended another basic principle of judicial procedure. The first point to note is that in the above case there is a clear finding that though a body constituted under the rules to decide the objections was an administrative Tribunal, if it is called upon to decide the respective rights of contesting parties, in other words, if there is a *lis*, the Tribunal has got a duty to decide the dispute judicially and in that particular case, it is obvious that the State Government has to act judicially in approving the scheme proposed by the State Transport Undertaking. But in the present case of an enquiry for punishing a departmental subordinate for irregularities, there is no question of two parties or a *lis* pending between them. Secondly several decisions cited above have held that there is no irregularity where such departmental enquiries provide for a preliminary enquiry which involves the writing down of depositions of witnesses being held by one officer as delegate of the punishing authority, and the punishing authority thereafter acting upon the statements so recorded, taking into consideration the findings given by the Enquiring Officer and after giving an opportunity to the delinquent officer to make his representations, dispose of the case by punishing or exonerating the delinquent officer. The principles laid down in *Gullapalli Nageswara Rao etc.* v. *State of Andhra Pradesh*[1] must, therefore, be applied only to proceedings which are quasi-judicial in nature and cannot be invoked for dealing with a departmental enquiry conducted according to the statutory rules against a delinquent Government Officer. In our opinion for the reasons mentioned above, the order in question is a directory order and not a mandatory order, and no error of jurisdiction vitiating the enquiry has resulted in the present case, through its non-compliance.

Next, we come to the second point regarding the merits of the allegation that the procedure adopted for punishing the respondent involved a violation of the rules of natural justice, in the sense that the opportunity given to him to defend himself was not a real one.

We will briefly summarise the procedure adopted at the enquiry. First of all, there were complaints from anonymous persons and other sources that the respondent was corrupt. Investigation was undertaken by the X Branch of the Crime Investigation Department and based on the report of the officer, who conducted this investigation, charges were framed against the respondent, and the Assistant Superintendent of Police, Hosur, Mr. M.V. N. Rao, was directed to hold the enquiry into sixteen charges of alleged corruption. The respondent submitted his explanation on 16th December, 1952. The enquiry before Mr. M. V. N. Rao began on 19th December, 1952. On 7th January, 1953, twenty-nine prosecution witnesses were examined and on 2nd March, 1953, another seven prosecution witnesses were examined. By 2nd March, 1953, the case against the delinquent officer, i.e., the prosecution evidence so to say was over. While this enquiry was proceeding, the respondent felt that he had not been given an opportunity of persuing all the records of the prior investigation so that he could cross-examine the prosecution witnesses. In particular, he mentioned in a petition, dated 14th January, 1953, to the Assistant Superintendent of Police, Hosur that he would like to peruse the petition on which the Crime Investigation Department took up investigation on the allegation of corruption against him and also the report of the Inspector of Police, X Branch, Crime Investigation Department who conducted the investigation. He also requested that some of the prosecution witnesses might be recalled for further cross-examination besides defence witnesses. Mr. M. V. N. Rao, the Enquiry Officer, informed the respondent on 21st January, 1953, that the defence should be completed and then such of the prosecution witnesses whom the respondent wished to recall for further cross-examination would be recalled, if the officer holding the enquiry was satisfied that further questions which he wished to put to such witnesses were relevant. Mr. M. V. N. Rao drew the respondent's attention

1. (1960) 1 M.L.J. (S.C.) 13: (1959) S.C.J. 53: (1960) 1 An.W.R. (S.C.) 13: (1960) 1 S.C.R. 580.

to Police Standing Order 90 (6). On 24th January, 1953, the respondent made a representation to the Enquiring Officer that further cross-examination of the prosecution witnesses should precede the examination of the defence witnesses. Sometime after this Mr. M. V. N. Rao was transferred and one Mr. Balasundaram was posted in his place as Deputy Superintendent of Police and commenced the enquiry. This new officer sent a memorandum to the respondent on 15th April, 1953, asking him if he required a *de novo* enquiry. The respondent stated that since he had cited most of the prosecution witnesses as defence witnesses, he was dispensing with a *de novo* enquiry. Thereafter, Mr. Balasundaram drew up a programme for examining the defence witnesses as well as the prosecution witnesses, whose examination was required by the respondent, and this programme was communicated to the respondent by a memorandum, dated 27th April, 1953. A perusal of this memorandum shows that under each heading of charge, the names of defence witnesses were first given and then the names of the prosecution witnesses whom the respondent required for being recalled were given subsequently. Thus, for the hearing on 3rd May, 1953, two witnesses cited as defence witnesses were given ranks as 1 and 2 and P.Ws. 1 and 2 recalled were given the ranks 3 and 4. In the meantime, the respondent was pursuing his request for perusal of documents for the purpose of the cross-examination of the witnesses already examined by the prosecution at a time when he did not have access to the records. Apparently, most of the records were given to the respondent for perusal and he informed the Enquiring Officer on 24th January, 1953, that he was grateful to the officer for having allowed him to peruse the statement recorded by the X Branch Inspector and he requested the officer to grant him copies of statements of six witnesses. Thus, it would appear that the statements of important witnesses already recorded during the investigation were given to the respondent for perusal before 24th January, 1953, and that he had no objections outstanding in regard to those statements. In the meantime, Mr. Balasundaram was transferred and one Mr. Rangabashyam was posted to his place and directed to conduct the enquiry. Mr. Rangabashyam posted the enquiry before him on 25th June, 1953, and 30th June, 1953. At this stage, the respondent came forward with two requisitions, one was for perusal of the records that he had already called for and the other was for further examination of the recalled prosecution witnesses before the examination of the defence witnesses. In regard to the second request, Mr. Rangabashyam, the Enquiring Officer, insisted that the respondent should examine his defence witnesses first before the prosecution witnesses were recalled to enable the respondent to cross-examine them. The respondent also sent a petition to the Deputy Inspector-General of Police on 2nd July, 1953, representing among other requests, that he should be given an opportunity to cross-examine the recalled prosecution witnesses first before the defence witnesses and to peruse all the records. The Deputy Inspector-General of Police in his reply, dated 7th July, 1953, stated that the respondent would be permitted to peruse at the oral enquiry, (*i.e.*) in the presence of the officer holding the enquiry, any records having a bearing on the enquiry other than any statements or notes, records or any preliminary or confidential documents. He also stated that if any record was considered unnecessary to be produced at the enquiry, written reasons would be recorded by the officer holding the enquiry. The officer holding the enquiry was made responsible for obtaining the presence of all witnesses including those cited by the respondent. No specific direction was given regarding the prayer for the examination of the re-called prosecution witnesses first before the examination of the defence witnesses. Mr. Rangabashyam informed the respondent on 26th June, 1953, peremptorily that the respondent had been already informed by the previous Enquiring Officer that under the provisions of Police Standing Order 90 (6) the defence witnesses would have to be examined first before recalling the prosecution witnesses. This memorandum also pointed out that on 25th June, 1953, when the respondent appeared before the Enquiring Officer, he gave a typed petition and walked away abruptly without waiting for orders. The memorandum also informed the respondent that if he did not appear before the Enquiring Officer within five days after the receipt of the memorandum, the oral enquiry would be closed and the charges

against him would be disposed of against him on merits. After the Deputy Inspector-General's directions, dated 7th July, 1953, were received, the Enquiring Officer again gave a memorandum directing the respondent to appear before him on 13th July, 1953, and 14th July, 1953. On 14th July, 1953, the respondent again insisted upon the recalled prosecution witnesses being examined first before the examination of the defence witnesses. He again asked for an opportunity to inspect the records at Salem on 13th July, 1953, and 14th July, 1953. If this request could not be complied with, he prayed for a *de novo* enquiry. In this letter the respondent drew attention to the memorandum of Mr. Balasundaram, Deputy Superintendent of Police, dated 27th April, 1953, in which all the witnesses and the records that he had cited in his defence had been summoned and stated that he was unable to know why the new officer Mr. Rangabashyam has cancelled the earlier order. The Enquiring Officer replied to this, refusing the alteration in the order of examination of the witnesses and also refusing a *de novo* enquiry. The memorandum mentioned that as many as twenty witnesses cited as defence witnesses had been summoned and were present on that day for examination, that the remaining witnesses could be called as and when necessary, and that if the respondent was not prepared to examine the defence witnesses present on that day, the proceedings would be conducted *ex parte*. Soon afterwards, the respondent gave a written reply to the Enquiring Officer that the oral enquiry might be stopped at that stage, so that he could take up the matter to the Deputy Inspector-General of Police or the Inspector-General of Police for redress. Thereafter the respondent did not take any further part in the enquiry. But it appears from the record that one defence witness was examined on 22nd July, 1953, and afterwards D.Ws. 2 to 12 were examined on 29th August, 1953, and D.Ws. 13 to 15 were examined on 30th August, 1953. Immediately after he was told that the proceedings would be continued *ex parte* against him without granting a *de novo* enquiry, he sent a petition to the Deputy Inspector-General of Police on 24th July, 1953, for a *de novo* enquiry and the Deputy Inspector-General refused his request by an order passed on 25th August, 1953. This order of the Deputy Inspector-General of Police can be extracted below :

"(i) You have already been given an opportunity to examine witnesses who may have anything to state which has any bearing on the enquiry in which you are concerned. It has been reported that you did not wish to examine them when the opportunity was given to you. It has therefore been correctly taken that you have changed your mind and did not wish to examine them.

(ii) As you are not the officer holding the enquiry you cannot be permitted to hold the enquiry as you wish. The officer holding the enquiry had been examining the witnesses in the order most suitable to the enquiry.

(iii) You have been trying to adopt stupid and obstructive tactics during the enquiry by asking for witnesses to be questioned and documents to be produced which have no bearing on the enquiry. The enquiry of course will not be started all over again."

It was presumably after the above order of the Deputy Inspector-General of Police that the Enquiry Officer examined eleven defence witnesses on 29th August, 1953, and 3 defence witnesses on 30th August, 1953, at a time when the respondent was not present. Thereafter, Mr. Rangabashyam drew up a minute finding the respondent guilty of most of the charges and these findings were accepted by the Deputy Inspector-General of Police and the respondent was dismissed from service and the Inspector-General of Police rejected the appeal preferred by the respondent.

The respondent in the writ petition attacked the procedure as being opposed to the principles of natural justice and amounting to a denial of reasonable right of defence, under several headings. We will refer to them briefly :

(i) There was refusal to supply to the respondent the former statements of witnesses recorded by the X Branch Crime Investigation Department Inspector. We have already referred to the fact that though at the earlier stages of the enquiry of the prosecution witnesses these statements were not made available to the respondent, he was allowed to peruse them at a subsequent stage and he expressed his gratitude to the Enquiring Officer Mr. M. V. N. Rao for allowing him to peruse the records. It is possible that he could have taken notes of these statements and

kept them for the purpose of cross-examining the witnesses, when they were expected to appear at a subsequent stage after being recalled. It is, therefore, difficult to understand why he should insist upon perusing these statements again at the subsequent stage of the enquiry. We, therefore, do not consider that this objection has any substance.

(ii) The second objection is that he wanted copies of certain documents which were not supplied to him. The first item is a copy of the petition on which the X Branch investigation commenced. This petition is said to be a pseudonymous one *vide* paragraph 3 of the affidavit. The respondent referred to a prior communication, dated 17th February, 1953, in which the Department had offered to make the petition available as soon as it was received, but he was subsequently informed on 23rd July, 1953, that the petition on which the Crime Investigation Department took up the investigation was not available. But in the counter affidavit in paragraph 40, the State Government stated that the petition was of pseudonymous nature and it was sent by the Inspector-General of Police to the Enquiring Officer. If it was an essential document it could have been obtained from the Inspector-General of Police. Since it was admittedly a pseudonymous petition, there would be no question of confronting any of the prosecution witnesses with a prior statement, even if a copy of this pseudonymous petition was supplied to the respondent. We, therefore, consider this ground to be baseless.

Reference was next made to the request of the respondent for being supplied with a copy of the accident register kept in the hospital at Salem. It was urged by the respondent that this accident register would show that he was present in the hospital, to which place he had taken a person injured in the course of an accident, at a time, when according to the Department, he is alleged to have been engaged in receiving bribes to release a person on bail. The respondent's contention was that this accident register, if produced, would be an effective *alibi* for him. The respondent wanted this document to be summoned because, after his suspension, he could not go about in his uniform to peruse the entries in the accident register. The respondent cited this document as a document for his defence in respect of charge No. 7. The Assistant Superintendent of Police, Mr. M. V. N. Rao, who conducted the enquiry, intimated the respondent that he would meet the District Medical Officer, Salem, and see that he was allowed to peruse the accident register. But nothing is known as to what happened to the summoning of this document but it is admitted that this document refers only to one of the sixteen charges against the respondent under fourteen of which he has been found guilty. Therefore, even assuming that this document should have been summoned to give an opportunity to the respondent for his defence, it would affect only one of the fourteen charges, and cannot be construed as a document which had prejudiced the disposal of the rest of the charges.

The third item referred to was refusal to supply of a list of investigation records received by the Deputy Superintendent of Police, Salem. After several reminders the respondent was told by the Enquiring Officer that the list of records received by the Deputy Superintendent of Police was not relevant and was not evidence by itself. It was open to the Enquiring Officer to admit only such of the documents as he considered relevant and, therefore, this objection appears to us to be groundless.

The fourth item related to the denial of the list of records handed over to Assistant Superintendent of Police, Hosur, by the Inspector on 21st December, 1952. On 13th July, 1953, respondent's request for the list was refused on the ground that it was not relevant. The respondent contended that the Enquiring Officer had admitted on an earlier occasion that he had given the document to the respondent for perusal on 7th January, 1953. But that will not affect the merits of the decision given on 13th July, 1953, about the irrelevancy of the document.

The fifth item was denial to supply a copy of the petition sent to the Deputy Superintendent of Police on which he investigated the case. This was a pseudony-

mous communication sent to the Deputy Superintendent of Police. The respondent alleged in his affidavit that on the allegations in the pseudonymous petition, the District Superintendent of Police had submitted a report that there was no such allegation against the respondent when he was in charge of the Mecheri Police Station. To the request of the respondent for this document, he was told that the document was probably in the Chief Office, Madras, and steps would be taken to get it, if possible. The document was thereafter never supplied to him. Learned Counsel for the respondent stated that the counter affidavit in regard to this allegation stated that the pseudonymous petition related to a Crime Investigation Department enquiry and it was not made available for perusal by the respondent. This may not be quite a satisfactory explanation. What we have already observed earlier in connection with another pseudonymous petition will apply to this document also.

Similarly, another petition by one Perumal Goundan to the Inspector-General of Police was also summoned by the respondent. The petition was to the effect that some Congressmen were coercing the respondent and other villagers to give false evidence against a Delinquent Officer. On 13th July, 1953, the Enquiring Officer informed the respondent that steps were being taken to ascertain whether a copy of it was received by the Inspector and make it available if possible. But subsequently the enquiry was conducted *ex parte*. We are of the opinion that none of the above grounds are adequate for holding the enquiry to be vitiated because of denial of natural justice or of reasonable opportunity to the respondent.

(iii) Another ground urged was that the enquiry was vitiated because, Mr. Rangabashyam, the third Enquiring Officer, declined to grant a *de novo* enquiry. It was pressed on us by the learned Counsel for the respondent that the enquiring authorities had conceded the principle that whenever there was a change in the personnel of the Enquiring Officer, a *de novo* enquiry could be claimed by the Delinquent Officer, *vide* the procedure adopted by Mr. Balasundaram, the second Enquiring Officer, when he took the place of the first Enquiring Officer Mr. M.V. N. Rao. In our opinion, the fact that the second Enquiring Officer, Mr. Balasundaram, gave an opportunity to the respondent to state whether the respondent would require a *de novo* enquiry, would not lead to the conclusion that a similar opportunity should be given at all subsequent stages when there was a change of personnel of the Enquiring Officer. No rule has been shown to us that the respondent could insist on a *de novo* enquiry in such circumstances as a matter of right. It is quite possible that Mr. Rangabashyam considering the time taken and considering the stage at which the enquiry had reached, when he took charge (by that time the evidence of the prosecution witnesses was already taken) could have very well refused a *de novo* enquiry on the ground that it was bound to lead to protraction of the proceedings unduly.

A similar ground was urged before us that the previous Enquiring Officer Mr. Balasundaram had arranged for the examination of the prosecution witnesses and the defence witnesses in a programme by his notice, dated 27th April, 1953, and that this programme clearly showed that he was prepared to concede the request of the respondent to examine the defence witnesses after the examination of the recalled prosecution witnesses. A perusal of this memorandum of Mr. Balasundaram, dated 27th April, 1953, shows that on the days when he had posted the enquiry for examining the witnesses, the names of defence witnesses are mentioned first and the names of recalled prosecution witnesses are mentioned next under each heading of charge. It cannot, therefore, be held that the principle that the recalled prosecution witnesses should be examined first before the examination of the defence witnesses had been conceded by the second Enquiry Officer Mr. Balasundaram and that, therefore, Mr. Rangabashyam, the third enquiring Officer, deliberately ignored this principle and thereby caused a failure of natural justice. However, there is one important difference in the procedure adopted by Mr. Rangabashyam when he took up the enquiry. He had not adopted the

procedure of hearing the witnesses both for the defence as well as the prosecution, charge by charge. There was a large number of defence witnesses whom he had summoned for the hearing on 22nd June, 1953, and without any reference to the grouping of witnesses under each charge, Mr. Rangabashyam insisted upon all the defence witnesses being examined first before the recalled prosecution witnesses could be cross-examined on any of the charges. Mr. Rangabashyam by this procedure seems to have proposed a rather summary method of dealing with the defence witnesses and ignored the more logical method suggested in the memorandum, dated 27th April, 1953. But on that ground it cannot be held that any principle of natural justice had been violated. It would appear that Police Standing Order 90 (6) contains a clause that after the completion of the defence, the Enquiring Officer should allow the delinquent officer to recall any witness for further examination, when the delinquent officer expresses his desire for that purpose. This provision has been relied upon by Mr. Rangabashyam and also by Mr. Balasundaram, when they insisted that the defence witnesses should be examined first before the recalled prosecution witnesses. But they have differed as to whether this rule should be applied charge by charge after splitting up the witnesses over the different charges for which they had to speak—the procedure adopted by Mr. Balasundaram—or whether they should be examined together irrespective of the charges—the procedure adopted by Mr. Rangabashyam. It can be stated that the delinquent officer cannot insist upon the Enquiring Officer following any particular order for the examination of the witnesses cited by him. But what is important to bear in mind is that neither Mr. Balasundaram nor Mr. Rangabashyam conceded the demands of the respondents that the recalled prosecution witnesses should be examined first before the defence witnesses. It is also important to note that the respondent did not demur to the procedure adopted by Mr. Balasundaram when, in respect of such charge, the defence witnesses were proposed to be examined first before the recalled prosecution witnesses. For the aforesaid reason, one may reasonably hold that the respondent adopted an obstructive attitude when he insisted before Mr. Rangabashyam that the defence witnesses should be examined last after the recalled prosecution witnesses were examined. Since he had only to cross-examine the recalled prosecution witnesses wherever there was a prior statement, for the purpose of contradiction he could have very well submitted to the direction of Mr. Rangabashyam instead of taking the obstructive attitude which he did in refusing to take part in the enquiry any further.

However, we are of the opinion that, after what happened on 22nd July, 1953, before the Enquiring Officer, the subsequent procedure adopted by the department cannot be supported on any reasonable interpretation, of the principles of natural justice. We recall that on 22nd July, 1953, the delinquent officer asked Mr. Rangabashyam to stop further enquiry. Since the order in which the defence witnesses had to be examined was not conceded to his satisfaction, he asked for a *de novo* enquiry. He stated that if *de novo* enquiry was not to be granted, he would address the Deputy Inspector-General of Police for clarifying the matter and in the meantime the proceedings should not go on. On that day, twenty of the defence witnesses cited by the respondent were present. But for some reason, which is not very clear, one of the defence witnesses was examined by Mr. Rangabashyam on that day itself. The enquiry seems to have been thereafter adjourned for nearly a month. The long interval up to 29th August, 1953, shows that the Enquiring Officer was prepared to postpone the proceedings from 22nd July, 1953, for a sufficiently long period to allow the result of the respondent's petition to the Deputy Inspector-General of Police to be known. The Deputy Inspector-General turned down the request of the respondent on 25th August, 1953, and informed the respondent of that fact. He must have also informed the local police officers of that fact. But on 29th August, 1953, the Enquiring Officer examined D.Ws. 2 to 12 and again on 30th August, 1953, he examined D.Ws. 13 to 15. This part of the enquiry was held behind the back of the respondent. Learned Counsel appearing for the respondent urged that the respondent applied for the postponement of the proceed-

ings on 22nd July, 1953, only for the purpose of obtaining orders from the higher authorities about the propriety of the procedure, but after the Deputy Inspector-General of Police turned down his request by order, dated 25th August, 1953, the Enquiring Officer was bound to give a notice to the respondent stating that he was going to recommence the enquiry in the light of the orders of the Deputy Inspector-General. The Enquiring Officer was not at all justified in proceeding to examine a large number of the respondent's own witnesses without giving notice to him and behind his back. This grievance has been put down in Paragraphs 15 and 16 of the affidavit of the respondent thus :

"..........Unfortunately the Deputy Inspector-General of Police, Western Range...... turned down my petition asking for the four reliefs................

Even though I was waiting for intimation for the further dates of the holding of the enquiry and the witnesses to be examined on each date, in view of the fact that my petition to the Deputy Inspector-General of Police had been disposed of by him by his order, dated 25th August, 1953, no such notice was ever received by me. It came rather as a shock to me, therefore, when I received the show cause notice, dated 2nd November, 1953 on 5th November, 1953 enclosing a copy of the minute drawn up by the Deputy Superintendent of Police, Mettur..........asking me why I should not be dismissed from service for having been found guilty of 12 out of 16 charges. *Fifteen days'* time was given to me for submitting my explanation to this lengthy minute. It was then I understand that some of the defence witnesses cited by me were examined on 29th and 30th July, 1953, without notice to me and behind my back."

The reply of the State in the counter-affidavit to this allegation was this :

"Defence witnesses present on 22nd July, 1953 were refused to be examined by the petitioner (respondent), and when he had walked out refusing to participate in the enquiry, the Enquiring Officer in all fairness examined them himself. It is submitted that no notice was necessary to be sent to the petitioner (respondent), when he had been informed that the proceedings would be completed *ex parte* without further reference to him."

Not merely were these defence witnesses examined behind the back of the respondent, but as pointed out by the learned Counsel for the respondent in the minute prepared by the Enquiring Officer, the evidence of these witnesses had been incorporated while dealing with charges 4 and 5.

It appears to us on the facts of the case that on 22nd July, 1953, there was a clear representation by the respondent that he was making a submission to the Deputy Inspector-General on the propriety of the action of the Enquiring Officer in the matter of examination of the witnesses, and that until the orders of the Deputy Inspector-General were received, he was not going to take part in the enquiry. The fact that the enquiry thereafter was not taken up for nearly a month would lead to the inference that the Enquiry Officer was not prepared to put into force immediately after 22nd July, 1953, his decision to proceed with the enquiry *ex parte*, and that the Enquiring Officer decided to adjourn the proceedings to await the result of the representation to the Deputy Inspector-General. No doubt one defence witness was examined on 22nd July, 1953. It is not clear whether he was examined either before or after the contest arose in the matter of the procedure. But the substantial number of defence witnesses were examined only after the decision of the Deputy Inspector-General was given. It was, therefore, the duty of the Enquiring Officer to intimate the respondent, after the orders of the Deputy Inspector-General were received, that in view of those orders the enquiry against him would be resumed, and give him a chance to appear at the further stage of the enquiry. It appears to us that, in the circumstances of the case, such a notice to the respondent was clearly called for. We cannot support the attitude of the Department in holding that by reason of the conduct of the respondent on 22nd July, 1953, it was no longer necessary to intimate him the fact that in view of the orders of the Deputy Inspector-General of Police the enquiry against him would be proceeded with according to the direction of Mr. Rangabashyam, which was confirmed by the Deputy Inspector-General. It was because of this unfortunate omission on the part of the Department that the respondent has made a complaint at all subsequent stages, that there was a denial of natural justice to him by reason of the fact that after the rejection of his request by the Deputy Inspector-General, he was not given a further opportunity to take part in the subsequent stages of the enquiry when his own witnesses were examined by the Enquiring Officer. Rajagopalan, J., in his order, now under appeal, observed :

"As the learned Additional Government Pleader pointed out, the petitioner (respondent) himself did not urge in the written representation he submitted to the Deputy Inspector-General in response to the notice to show cause against the proposed punishment, that the petitioner (respondent) had been prejudiced in the conduct of his defence by the examination of the witnesses by Mr. Rangabashyam on 22nd July, 1953 and onwards."

This representation of the learned Additional Government Pleader, which was accepted by Rajagopalan, J., was clearly inaccurate, because in the written representation made by the respondent to the Deputy Inspector-General on 17th November, 1953, in response to the show cause notice he stated :

"The fact that the defence witnesses were examined in my absence also proved another denial to me of a chance to put forth my case as against the prosecution case."

Thus, the respondent at all material stages, after the preliminary enquiry was over, had taken the stand that the enquiry conducted by Mr. Rangabashyam after 22nd July, 1953, and after the orders of the Deputy Inspector-General were received amounted to a denial to him of a chance to put forth his case as against the prosecution. As against this argument, the learned Additional Government Pleader contended that even, if these two charges (charges 4 and 5) for which the evidence of defence witnesses taken behind the back of the respondent were relied upon, were to be ignored, there were still other charges for which the respondent had been found guilty and they would support the order of dismissal against him. But the objection raised by the respondent to this procedure goes somewhat deeper than the point that the evidence of defence witnesses were relied upon only for two of the charges. What happened at the enquiry before the Enquiring Officer after 22nd July, 1953, was that a brief note was made of what each defence witness had to depose. Several of these witnesses were official witnesses. It was surely the function of the respondent to decide which of these witnesses cited by him should be examined and what questions should be put to them in the light of the materials in his possession. The procedure adopted by the Enquiring Officer of taking formal statements from these defence witnesses could not take the place of their being properly examined by the delinquent officer, who had cited them in his defence.

The learned Additional Government Pleader argued that it is open to us to treat the hearing of the case closed as on 22nd July, 1953, when the examination of the prosecution witnesses was over and ignore charges 4 and 5 about which the defence witnesses had spoken on 29th September, 1953, and 30th August, 1953, and hold the dismissal to be valid in regard to the rest of the charges. But this contention would amount to saying that it is open to the Department to split up the enquiry into two stages, one representing a valid stage and the other representing an invalid stage and ask the Court to affirm the findings in so far as what transpired at the valid stage. The departmental enquiry against an officer must be treated as a single and entire proceeding leading up to the findings against him. If that enquiry involved a stage where the proceedings were vitiated, it will not be proper to speculate that what transpired during the invalid stage of the enquiry was not material and that what had happened prior to the invalid stage would be sufficiently material to support the findings of the guilt of the delinquent officer and consequently the order of dismissal against him. Where there are number of charges against a delinquent officer, and some of them are proved and some of them are held to be not proved, it is open to the High Court in writ proceedings to hold that the order of punishment would be valid even on the basis of the charges found proved as has been held by the Supreme Court in the Orissa case. But that principle cannot be extended to this case in the manner sought by the learned Additional Government Pleader by breaking up the enquiry itself into portions and ignore a stage of the enquiry that must be treated as invalid, and rely on the evidence elicited at the anterior stage where the enquiry was valid.

For this last-mentioned reason, we are of the opinion that the respondent was not given a reasonable opportunity to defend himself, that the enquiry was opposed to the principles of natural justice and that the order of dismissal requires to be quashed.

Learned Counsel for the respondent referred us to some other grounds for attacking the propriety of the order. Thus, he claimed that after the closing of the enquiry the respondent should have been given an opportunity to file a further written statement, that the time given for submitting his explanation to the show cause notice, namely, 15 days, without extension was inadequate, that the punishing authority should have granted him permission to interview him, as requested by him and that the non-compliance with these requests also vitiated the enquiry. But so far as the last-mentioned point is concerned, the relevant rule of the disciplinary rules contained in Appendix III of the Police Standing Order is rule 2 (*b*) (i) which entitles the delinquent officer to put in a further written statement of his defence ; but it is for him to offer to put a further written statement and there is no suggestion that that offer was turned down. It is provided in the same rules that if no oral enquiry had been held and if the delinquent officer desires to be heard in person, he shall be so heard by the punishing authority. Similarly, under rule 2 (*b*) (ii) the officer empowered to impose the penalty, who acts upon the report of the Enquiring Officer, is required to call upon the delinquent officer to show cause within a reasonable time not ordinarily exceeding one month against the particular penalty proposed to be inflicted and any representation in this behalf submitted by the person charged shall be taken for consideration before the passing of the final orders by the punishing officer. This rule does not make it mandatory that at this last-mentioned stage, the punishing officer should give to the delinquent officer an oral interview. The word used is *representation* and it is not the same thing as a personal hearing. The other contentions mentioned above do not appear to us to be material ones for the purpose of vitiating the enquiry.

In view of our finding above, we are of the opinion that this is a case where the order dimissing the respondent has not been in conformity with Article 311 of the Constitution and the principles of natural justice have been violated. We, therefore, dismiss the appeal, though for reasons different from those mentioned by Rajagopalan, J. There will be no order as to costs.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

The Merchants Bank, Ltd., Thanjavur, The Tanjore Permanent Bank, Ltd., by its Secretary B. K. Mahadevan, substituted in the place of the original Plaintiff .. *Appellant**

v.

Dharmasambarthani Ammal and others .. *Respondents.*

Banking Companies Act, 1949 (*X of* 1949), *sections* 45 (5) (*e*), 45 (14), 45-*L* (4)—*Banking Companies—Scheme of amalgamation—Scheme has the force of law—Suit for damages based on misfeasance and malfeasance instituted by transferor bank—Transfer of all assets, liabilities, rights and interest including rights of pending actions to transferee bank under the Scheme—Transfer of mere right to sue and limitations as to transferability and assignability—Applies to contractual transactions only—Transfer by operation of law (under the scheme), not affected—Accrued right as incidental to the transfer of property to which it is attached— Valid.*

Scheme of amalgamation—Provisions prevail over any other law—Continuance of pending actions by or against—Provision in the Scheme—Continuance of suit by transferee bank—Application not provided for.

Fiction—No extension beyond express provision—Reference in Banking Companies law to provision in Companies Act for assessing damages against delinquent directors—Not to mean the applicability of entire provisions relating to winding up.

The first plaintiff bank filed a suit against the employees of the Bank claiming a sum of money based on the various acts of misfeasance and malfeasance in respect of the funds of the Bank. It had also prayed for a decree on the basis of a mortgage executed in its favour by one of the defendants. During the pendency of the suit, under a Scheme of Amalgamation settled by the Central Government, the first plaintiff bank was taken over by the second plaintiff. The Scheme of Amalgamation specifically

* Appeal No. 399 of 1962. 24th February, 1965.

provided for the continuance of the rights of pending action by or against the plaintiff bank. On the question if the suit could be continued by the second plaintiff transferee bank, impleaded in the suit on its application,

Held, the transferee bank is entitled to continue the action.

A cause of action based on a tort like negligence, misfeasance or malfeasance is in the nature of a personal claim which abates or terminates with the death of the tort-feasor. A mere right to sue is not transferable or assignable under the Transfer of Property Act and under the general law. But this limitation as to transferability and assignability is confined to contractual transactions and does not in any way affect a transfer or assignment by operation of law by statute or otherwise, as enacted in section 2 (*d*) of the Transfer of Property Act.

A Scheme of Amalgamation settled by the Central Government has the force of law.

Even apart from the provisions of sections 6 (*e*) and 2 (*d*) of the Transfer of Property, Act, an accrued right to sue for damages was not a right which by its very nature is incapable of being transferred. Such right might be transferred with property to which it was incidental without infringement of any rule of law.

Notwithstanding the unhappy phraseology used in section 45 (5) (*e*) of the Banking Companies Act, its intention is clearly to enable the transferee bank to continue actions or proceedings started by the transferor bank and pending immediately before the date of the order of moratorium. Actions by or against the transferee bank are preserved.

By virtue of section 45 (14) of the Banking Companies Act the provisions of the Scheme of Amalgamation prevail over even the express provision in section 45 (5) (*e*). The words " Subject to the provisions of the Scheme " cannot be limited to the provisions relating to the manner of continuance only of pending actions.

There is nothing in the Companies Act or the Banking Companies Act which on the amalgamation of a bank with another bank, automatically puts an end to a pending suit on misfeasance, and requires the transferee bank to resort to section 45-L of the Banking Companies Act and apply under section 543 of the Companies Act. A fiction or deeming provision cannot be extended beyond the purposes for which it was made. It cannot be said that by reason of the provisions contained in section 45-L (4) all the provisions of the Companies Act relating to winding-up would be attracted to a scheme of amalgamation.

Even otherwise, the suit filed by the transferor bank was filed long before its amalgamation, and at that time it was maintainable and constituted a proper remedy. There is no statutory provision under which it has ceased to be a remedy and the jurisdiction has been shifted from one forum to another in respect of it. Nor is it correct to say that the change-over has been brought about so that not a suit but an application for misfeasance alone would lie at that stage.

Appeal against the decree of the Court of the Subordinate Judge of Thanjavur in Original Suit No. 1 of 1961.

M. S. Venkatarama Ayyar and *V. Krishnan*, for Appellant.

T. K. Subramania Pillai and *R. Shanmugam*, for 1st Respondent.

K. Sarvabhauman and *S. Narayanan*, for 2nd Respondent.

V. Kunchithapadam, for 3rd Respondent.

K. Rajah Ayyar, Vittal V. Soull and *P. Nagasundararajan*, for 4th, 7th, and 8th Respondents.

R. Rangachari and *R. Raghunathan*, for 6th Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—This appeal by the second plaintiff turns on the maintainability of the suit originally brought by the first plaintiff. The suit was for recovery from the several defendants of a sum of Rs. 60,000 with subsequent interest, the basis of the claim being that, as employees of the first plaintiff, defendants 2 to 8 and the husband of the first defendant were guilty of various acts of misfeasance, and malfeasance in respect of the funds of the first plaintiff and misappropriated the same to a tune of Rs. 1,16,000. The first plaintiff also prayed for a mortgage decree on the foot of a security which the second defendant had executed in his favour in relation to the same mishandling of the funds. The first defendant's husband was the secretary of the first plaintiff from 1926 till March 18, 1957, when he died, leaving his widow, the first defendant. Though the articles of association vested the management of the first bank in a Board of Directors, the Board would appear to have confided and entrusted to the secretary the actual transactions and control of the affairs of the first plaintiff. But between 1945 and 1957 a number of fraudulent misappropriations were committed by the first defendant's husband with the help of the rest of the

defendants, who were the first plaintiff's employees, like cashier, accountant, bill collector, confidential clerk and peon. On inspection by the Reserve Bank and as per its report in August, 1957, and the audit report dated 29th April, 1957, it was discovered that there was a heavy shortage of Rs. 1,16,510-7-7. The first plaintiff charged the husband of the first defendant and the rest of the defendants with misappropriation, misfeasance, acts of gross and fraudulent negligence and misconduct, and, though the amount misappropriated was much larger, limited its claim in the plaint to the amount we have already mentioned. The fourth defendant had already executed a promissory note for a sum of Rs. 2,000 in favour of the first plaintiff to cover his portion of the responsibility in regard to the acts of misfeasance. While the suit was pending, on the intervention of the Reserve Bank, the first plaintiff was amalgamated with the second plaintiff-bank on and from 4th September, 1961 by orders of the Central Government published in the *Gazette of India*, Extraordinary, dated 29th August, 1961. On the application of the second plaintiff it was impleaded in that capacity on the ground that the interests of the first plaintiff had devolved on the second. Thereupon an additional issue was framed, namely,

"whether the Thanjavur Permanent Bank, the newly constituted plaintiff, is entitled to continue the suit and get the reliefs prayed for in the suit."

The parties went to trial on this preliminary issue, with the result the learned Subordinate Judge took the view that the second plaintiff had no *locus standi* to continue the suit and that, in fact, the suit was not a proper remedy, and dismissed the suit.

The Court below formed that view as, in its opinion the suit was in substance one for damages for misfeasance, which could not survive the amalgamation of the first plaintiff with the second plaintiff-bank. The Court below was of the further view that the relative provisions in the Banking Companies Act, 1949, for continuance of suits and proceedings in cases of amalgamation of banks, did not help the second plaintiff, as there was a lacuna in section 45 (5) (*e*) of the Act, and the scheme of amalgamation could not be read as filling up the lacuna or having an over-riding effect. The Court below also thought that the remedy of the second plaintiff was to file an application before the proper forum under section 543 of the Companies Act, 1956, read with section 45-H of the Banking Companies Act, 1949. We have come to the conclusion that the Court below is not right on any of these matters.

It is not a matter for doubt that a cause of action based on a tort like negligence or misfeasance or malfeasance is in the nature of a personal claim which abates or terminates with the death of the tort-feasor. That a mere right to sue is not transferable and cannot be assigned does not also require authority. Section 6 (*e*) of the Transfer of Property Act is expressly to that effect. Even apart from statute, the position is the same even under the general law. But it should be noted that this limitation to transferability or assignability is confined to contractual transactions and does not in any way affect a transfer or assignment by operation of law, by statute or otherwise. In the present context, *N. C. Jute Mills Co., Ltd.* v. *R. S. Navigation Co.*[1], appears to be directly in point. That was a case of sanction by Court of a scheme of amalgamation of two companies. The scheme ordered by the Court provided that any suit or other legal proceeding, if pending in any Court by or against the company which was amalgamated, be continued by or against the company with which the latter was amalgamated. On that basis an application was made for bringing the company, after amalgamation, on record, but it was dismissed on the view that the transfer to the applicant was no more than a mere right to sue for damages for breach of contract. Das Gupta, C.J., as he then was, and Bachawat, J., held that the transfer being by order of Court of competent jurisdiction, section 6 (*e*) of the Transfer of Property Act had no application, having regard to section 2 (*d*) of the same Act, and that even independent of that, an accrued right to sue for damages was not a right which by its very nature was incapable of being transferred. Such right might be transferred with property to

1. (1959) 29 Comp. Case 357: A.I.R. 1959 Cal. 352.

which it was incidental without infringing any rule of law. In taking the view, the learned Judges distinguished *Nokes* v. *Doncaster Amalgamated Collieries Ltd.*[1] This Calcutta case clearly decided that where transfer of such a right to sue is by operation of law, as in that case, by order of Court, section 6 (*e*) of the Transfer of Property Act would have no application thereto. The position in the instant case is practically analogous to that in the Calcutta case with this difference, that here the scheme of amalgamation was brought about by the Government of India and not by an order of Court. But that makes no difference to the legal position, because a scheme of amalgamation settled by the Central Government has the force of law, as we shall point out in due course. The scheme with which we are concerned transferred the first plaintiff's assets, liabilities and other rights and interests to the second plaintiff, including all rights of action. Apart from the generality, the scheme also specifically provided that if, on the prescribed date, any suit, appeal or other legal proceeding of whatever nature by or against the transferor bank is pending, the same shall not abate, or be discontinued or be in any way prejudicially affected but shall, subject to the other provisions of the scheme, be prosecuted and enforced by or against the transferee bank. It is, therefore, clear, as was the case in the Calcutta decision, that the right to continue the suit was something which was attached to the property to which it was incidental and which was under the scheme of amalgamation transferred from the first plaintiff to the second plaintiff.

On that view it may not be necessary even to consider whether on the averments in the plaint the cause of action was something more than a mere right to sue for damages. But it is clear from the plaint that the second defendant had, as a matter of fact, executed a security, so is the averment, for a sum of Rs. 30,000 to cover liability on account of misfeasance, and the second prayer, as we already indicated, in the plaint is for a mortgage decree on the basis of the security. The security is obviously a tangible asset and surely is transferable or assignable. The fourth defendant also, as seen from the plaint allegations, had executed a promissory note for Rs. 2,000 in respect of his share of liability for misfeasance. It does not appear the attention of the Court below was directed to this aspect of the matter.

In any event, section 45 (5) (*e*) of the Banking Companies Act, 1949, which was introduced by Act XXXVII of 1960, puts the maintainability of the suit by the second plaintiff beyond doubt. Sub-section (5) says that the scheme of amalgamation may contain provisions for all or any of the matters mentioned therein, and one of them is contained in clause (*e*) which reads :

> " Subject to the provisions of the scheme, the continuation by or against the banking company on its reconstruction or, as the case may be, the transferee bank, of any actions or proceedings pending against the banking company immediately before the date of the order of moratorium".

Factually in this case there had been a moratorium before the scheme of amalgamation was settled and published by the Central Government. The Court below construed this sub-section as disclosing a lacuna because it thought that it only enabled the transferee bank to continue an action pending against the banking company merged with it on amalgamation. That, in our opinion, is clearly a wrong view to take of the scope of the sub-section. It is true the sub-section has not been cautiously worded and clarity has been sacrificed, apparently, for the sake of brevity. The object of the sub-section *ex facie* is to enable a banking company on its reconstruction or a transfere bank to continue certain things. It is clear that an action against either the one or the other pending on the relevant date is to continue. But it is argued that as far as the transferee bank is concerned, what the sub-section contemplates is only the continuance of action against the banking company which was amalgamated with it, and not an action filed by the latter and pending on the date of the order of moratorium. This argument fails to give effect to the preposition "by" which, in our view, controls the meaning of the sub-section. The words " continuation by the transferee bank " can obviously relate to not an action pending against it, for this is also provided for in the section itself, but only to an action filed by it and pending on the relevant date. It was suggested that "continuation by the trans-

1. L.R. (1939) 2 K.B. 578.

feree bank of an action pending against it" refers to continuation of defence. But, if that is the meaning, the words " continuation against the bank " and "proceedings pending against the banking company " can hardly have any content. By those words actions against the transferee company are continued. In our view, notwithstanding the somewhat unhappy phraseology used in clause (*e*), its clear intention is to enable the transferee bank to continue actions or proceedings started by the banking company and pending immediately before the date of the order of moratorium. On that view of the scope of sub-section (*e*), the further argument that the scheme which provides for continuance of suits filed by the first plaintiff, could not prevail over sub-clause (*e*) of sub-section (5), cannot be supported. On the other hand, sub-section (14) of section 45 clearly points out the effect of a scheme. It says that the provisions of section 45, and of any scheme made under it, shall have effect, notwithstanding anything to the contrary contained in any other provisions of the Act or in any other law or any agreement, award or other instrument for the time being in force. Obviously, the provisions of the scheme have an overriding effect and prevail over any other law. It is true equally sub-clause (*e*) of sub-section (5) will prevail, but, in this context, the opening words of sub-clause (*e*), namely, " subject to the provisions of the scheme " assume importance. By those words it is plain that the provisions of the scheme will even prevail over the express provision in that sub-clause as to the continuance, of suits or proceedings. It was suggested at the Bar that those words " subject to the provisions of the scheme " pertained to the provisions in the scheme relating to the manner of continuance. We do not think that we can read the words in such a limited way. It follows from our view of the statutory provisions that the second plaintiff is entitled to continue the suit.

That takes us to the last point as to whether the suit is the proper remedy. On that, there can be no difficulty because, so far as we are aware, there is nothing in the Companies Act, 1956, or the Banking Companies Act, 1949, which, on amalgamation of a bank with another bank, automatically puts an end to a pending suit based on misfeasance, and requires the transferee company to resort to section 45-L and apply under section 543 of the Companies Act. For one of the respondents, it was argued with reference to sub-section (4) of section 45-L that by reason of it, all the provisions of the Companies Act relating to winding up would be attracted to a scheme of amalgamation approved and published by the Central Government under the provisions of the Banking Companies Act, 1949. But it is well-known that a fiction or a deeming provision cannot be extended beyond the purpose for which it was made. Further, sub-section (4) of section 45-L itself makes it clear that by reason of it all that would be attracted from the Companies Act is only section 543. Quite apart from these considerations, it should be remembered that the suit was filed by the first plaintiff long before its amalgamation and when it was filed, it was maintainable and constituted a proper remedy. There is no statutory provision under which it has ceased to be a remedy and the jurisdiction has been shifted from one forum to another in respect of it. Nor do we think that a change-over has been brought about so that not a suit, but an application for misfeasance alone would lie at this stage.

The appeal is allowed, and the decree of the Court below is set aside. The suit is remitted to it for trial and disposal. Cost of this appeal will be cost in the cause. The Court-fee paid on the memorandum of appeal will be refunded.

V. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Original Special Jurisdiction.)

PRESENT :—MR. JUSTICE K. VEERASWAMI.

A. R. Sundararajan .. *Petitioner* *

v.

A. P. Chelliappan and another .. *Respondents.*

Industrial Disputes Act (XIV of 1947), section 25-FF—Applicability—Partnership doing transport business—Dissolution—Apportionment of buses and workmen between the ex-partners—If transfer of business entitling workmen to retrenchment compensation.

Dissolution of partnership involves a transfer neither of ownership nor of management of the undertaking of the partnership. Where on dissolution of a firm doing transport business the buses and workmen are apportioned between the erstwhile partners, the workmen still continued to be employed under one of the erstwhile partners. In that sense there was no change in the employment or the employer. Therefore section 25-FF of the Industrial Disputes Act is not applicable to such a case and the employees are not entitled to retrenchment compensation.

Petition under Article 226 of the Constitution of India praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue a writ of *certiorari* calling for the records in Claim Petition No. 274 of 1961, dated 19th January, 1962, on the file of the Presiding Officer, Labour Court, Madurai, and quash the said order therein.

K. Thirumalai, for Petitioner.

S. Palaniswami and *K. Venkataswami* for Additional Government Pleader (*V. Ramaswami*), for Respondents.

The Court made the following

ORDER.—The order sought to be quashed was made under section 33-C (2) of the Industrial Disputes Act, 1947. The first respondent was employed as a conductor from 10th February, 1951 to 20th May, 1961 on a basic wage of Rs. 45 and dearness allowance of Rs. 29 per mensem in the transport business of a firm of partnership with the name and style of Sundaram Transports, Sivakasi. On 3rd January, 1961, there was a dissolution of the partnership and the assets and liabilities were divided between the two partners, one of them being the petitioner. It appears that the buses were apportioned between the two partners and with them also the staff. On that basis the first respondent happened to be allotted to the other partner. The first respondent applied to the Labour Court, Madurai, for determination of his retrenchment compensation on the footing that the dissolution of the partnership involved a change of ownership or of management of the undertaking. The Labour Court does not appear to have addressed itself to the question as to whether at all the facts would attract the application of section 25-FF. On the other hand, the Labour Court proceeded on the assumption that the section would apply and it was of the opinion that inasmuch as the third condition in the proviso to the section was not satisfied, the first respondent was entitled to retrenchment compensation as computed by it. This petition is to quash its order.

A firm of partnership, as far as I can find, has never been held to be a legal entity like a company. It is true that for certain purposes under the Civil Procedure Code a firm is treated as a legal entity. But the legal fiction goes no further. A firm of partnership is but a convenient and compendious device by which two or more individuals join together, pool their resources or labour on a joint venture of business. In a firm each partner is deemed to act for the other, though in a sense the firm owns the assets and is responsible for the firm's liabilities. In law the assets of the firm are owned by the members of the firm and the liabilities are owing by them. It flows from these propositions that when a firm is dissolved, no transfer of ownership as such is involved. All that follows from the process of dissolution is that what is owned in common is defined in severality and each member takes his share of the property subject to his share of the liability. That being the case,

*W.P. No. 401 of 1962. 22nd April, 1964.

dissolution of partnership neither involves a transfer of ownership nor involves transfer of management of the undertaking. This principle appears to have been recognized by the Calcutta High Court in *Alex A. Apcar (Jr.) & Co.* v. *M. N. Gan*[1] with which I am in agreement. There the firm consisted of two partners but by an arrangement between them one of the two took over the entire assets and liabilities and continued the undertaking. It was held that when plural proprietors became a single proprietor there is no change in the employer within the meaning of section 25-F and section 25-FF of the Industrial Disputes Act. When the firm in the instant case was running the business, the first respondent was employed under it. That meant that he was employed under its partners. After its dissolution, the first respondent still continued to be employed under one of the erstwhile partners. In that sense there is no change in the employment or the employer.

I hold, therefore, that section 25-FF is not applicable to the facts of the case. The order of the Labour Court is quashed and the petition is allowed but without costs.

K.S. ——— *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. S. RAMACHANDRA IYER, *Chief Justice.*

K. V. Meenakshisundaram .. *Petitioner**

v.

V. Narayanaswamy Naidu and two others .. *Respondents.*

Madras Court-fees and Suits Valuation Act (*XIV of* 1955), *section* 87 (2)—*Attachment of property as belonging to* X *in execution of a money decree against him in a suit of* 1953—*Claim petition by* Y *and* Z *filed on* 9*th July*, 1961 (*claiming that they were the owners of the property and it could not be validly attached in execution*) *allowed* —*Suit under Order* 21, *rule* 58, *Civil Procedure Code* (*V of* 1908) *for setting aside that claim order*—*If can be treated as continuation of the suit of* 1953 *and Court-fee paid under the earlier Court-fees Act.*

Where in execution of a money decree against *X* in a suit of 1953, the plaintiff attached certain property as belonging to *X* but *Y* and *Z* filed an application on 9th July, 1961 claiming that they were the owners of the property and it could not be validly attached in execution of the decree against *X* and the claim was allowed the suit by the plaintiff under Order 21, rule 58 for setting aside that claim order cannot be treated as a continuation of the earlier suit itself in which the decree executed was obtained so as to entitle the plaintiff to pay a Court-fee of Rs. 15 on the plaint under Article 17 (1) of Schedule II of the Madras Court-fees (Amendment) Act (V of 1922). The Court-fee payable would be under section 41 (2) of the Madras Court-fees and Suits Valuation Act (XIV of 1955). Section 87 (2) of Madras Act (XIV of 1955) has no application to the suit, which can only be treated as a continuation of the claim proceedings and not of the earlier suit of 1953.

Petition under section 115 of Act V of 1908, praying the High Court to revise the order of the Subordinate Judge, Coimbatore, dated 21st April, 1962 and made in unnumbered plaint of 1962.

V. S. Rangaswamy Iyengar, for Petitioner.

T. R. Ramachandran and *N. Varadarajan*, for Respondents.

T. N. C. Rangarajan for Government Pleader (*A. Alagiriswami*), for State.

The Order of the Court was made by

Ramachandra Iyear, C.J.—This Revision Petition raises a question as to the applicability of the Court-fees Act, 1955. The suit in respect of which this question arises, was filed under Order 21, rule 58, Civil Procedure Code under the following circumstances. In Original Suit No. 257 of 1953, the plaintiff in the present suit obtained a decree against the third defendant for a sum of Rs. 4,488 together with interest and costs. In execution of that decree he attached certain property as belonging to the third defendant ; while that attachment was pending, defendants 1 and 2 to the suit filed Execution Application No. 978 of 1961, on 9th July, 1961, claiming that they were the owners of the property and that it could not be validly

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1. A.I.R. 1960 Cal. 14.

* C.R.P. No. 2205 of 1962. 29th April, 1964.

attached in execution of a decree against the third defendant. Their claim was allowed on 29th September, 1961. Thereafter, the plaintiff has filed the present suit for setting aside that claim order. A sum of Rs. 15 was paid as Court-fee on the plaint under Article 17 (1) of Schedule II of the Madras Court-fees (Amendment) Act (V of 1922). The learned Subordinate Judge returned the plaint as insufficiently stamped, as according to him, the Court-fee payable would be under section 41 (2) of the Madras Court-fees and Suits Valuation Act (XIV of 1955). The correctness of this view has been challenged by Mr. V. S. Rangaswami Ayyangar, appearing for the petitioner.

Learned Counsel has in this connection invited my attention to section 87 (2) of the Act, which says :

> " All suits and proceedings instituted before the commencement of this Act and all proceedings by way of appeal, revision or otherwise arising therefrom, whether instituted before or after such commencement shall, notwithstanding the repeal of the Court-fees Act, 1870...... be governed by the provisions of the said Act and the Rules made thereunder."

It is argued that as the present suit is but a continuation of the claim proceedings which, in turn, were the consequence of the decree passed on 19th January, 1954, the Court-fees Act that would be applicable to this suit will be only the old Act. It is no doubt true that a suit filed under Order 21, rule 58, Civil Procedure Code is regarded for certain purposes as a continuation of the claim proceedings which had given rise to that suit. But the argument of learned Counsel goes further than this ; he says that the nexus between the claim suit and the previous proceedings goes even beyond those proceedings and it should really be connected with the suit of the year 1953 in which claim proceedings were filed. It is argued that :

" all proceedings by way of appeal, revision or otherwise" occurring in sub-clause (2) of section 87 will take in a subsequent claim suit following the execution proceedings in the first suit. This contention proceeds upon a misunderstanding of the scope of a claim suit. The subject-matter of a suit under Order 21, rule 58 or 103, Civil Procedure Code is the summary order that preceded it and not what formed the subject-matter of the earlier suit. It can, therefore, be said that it is connected with that summary order. There is, therefore, no warrant for holding that such a suit is connected with the earlier suit itself. For example, the earlier suit might be merely one for money. But a claim suit is very often concerned with immovable property. There can, therefore, be no connection between the two, though the latter will be the outcome of the execution proceedings in the former. In *Tiruvengadaswami* v. *State of Madras*[1], Panchapakesa Ayyar, J., held that a claim suit under Order 21, rule 58, Civil Procedure Code instituted after the commencement of the new Court-fees Act of 1955, in respect of claim petitions filed before the coming into force of the new Act, would be governed by the provisions of the earlier enactment. That is, because of the claim suit being a continuation of the earlier claim proceedings. No authority has, however, been brought to my attention, where it has been held that the claim suit under Order 21, rule 58, Civil Procedure Code can be said to arise out of the original suit itself. Reference was made to *Chakravarthi* v. *Collector of Madras*[2]. That was a case where claims were filed under the Land Acquisition Act after the coming into force of the new Court-fees Act, 1955. But the notification under the Land Acquisition Act, in respect of which the claims were made, was issued prior to the coming into force of that Act. It was held that the proceedings under section 18 of the Land Acquisition Act being a continuation therefrom, the earlier Act would apply. I cannot see how this decision would help the petitioner. There was a direct connection between the notification and the claim in that case. I am, therefore, of opinion that the view taken by the learned Subordinate Judge is correct. This Civil Revision Petition fails and is dismissed. There will be no order as to costs.

The petitioner will have one month's time after the reopening of the lower Court after summer recess to pay the requisite Court-fee.

K.S. ——— *Petition dismissed.*

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1. (1959) 1 M.L.J. 151 : I.L.R. (1959) Mad. 460.
2. (1960) 2 M.L.J. 207 : I.L.R. (1960) Mad. 954.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

The Karaikal Castings and Rolling Mills and The Karaikal Metal Industries, Karaikal .. *Petitioner* *

v.

The Government of Pondicherry through its Secretary, Planning and Development Department .. *Respondent.*

Non-Ferrous Metal Control Order (1958) (*as amended on 4th December*, 1959)—*Applicability of to imported non-ferrous metals other than copper—Applicability to the Union Territory of Pondicherry and to non-importers.*

Evidence Act (*I of* 1872), *section* 115—*Licensee under Non-Ferrous Metal Control Order agreeing to abide by terms of licence—If estopped from challenging the validity of Non-Ferrous Metal Control Order.*

The Non-Ferrous Metal Control Order, 1958, applies only to imported copper and does not extend to other metals. Section 1 (2) of the Non-Ferrous Metal Control Order states that it shall apply in the first instance to imported copper but the Central Government may by notification direct that it shall apply to other imported non-ferrous metals but such extension has not been made to the case of metals other than copper.

It cannot be contended that the Non-Ferrous Metal Control Order does not apply to the territory of Pondicherry on the ground that no order under section 4 (2) (*a*) of the Foreign Jurisdiction Act has been made extending it to the territory of Pondicherry. The Non-Ferrous Metal Control Order has been issued under section 3 of the Essential Commodities Act, 1955. The Essential Commodities Act itself has been extended to the territory of Pondicherry by a notification under section 4 (2) (*a*) of the Foreign Jurisdiction Act. The orders issued under the Essential Commodities Act are part of the Act itself and no fresh notification will be necessary every time such an order is issued to make them applicable to Pondicherry to which the Essential Commodities Act itself has been extended.

After the amendment of the Non-Ferrous Metal Control Order on 4th December, 1959 whereby the word "importer" has been deleted in the several provision of the earlier orders and the word "a person" is substituted it cannot be contended that the Non-Ferrous Metal Control Order applies only to importers.

A licensee who has agreed to abide by the terms of the licence issued to him under the Non-Ferrous Metal Control Order will not be estopped from challenging the validity of the Order under which the licence is granted to him, *viz.*, the Non-Ferrous Metal Control Order, as there can be no estoppel in such a case.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith, the High Court will be pleased to issue a writ of prohibition directing the respondent not to take further proceedings in respect of the show cause Memo. No. 1878-Dev./64 dated 17th April, 1964 of the Government of Pondicherry, Planning and Development Department.

M. S. Ramaswamy, for Petitioner.

The Government Pleader for the State of Pondicherry, on behalf of Respondent.

The Court made the following

ORDER.—The petitioner is the proprietor of the Karaikal Castings and Rolling Mills and the Karaikal Metal Industries at Karaikal, in the Union Territory of Pondicherry. He obtained a licence under the Non-Ferrous Metal Control Order, 1958, an Order issued by the Central Government in exercise of the powers conferred upon it under section 3 of the Essential Commodities Act of 1955. Under the terms of the licence, he had to comply with certain conditions regarding the stocking and disposal of several non-ferrous metals which are specified in the Non-Ferrous Metal Control Order, 1958. The authorities had reason to believe that he had not disposed of surplus stocks in the manner required under the licence. So the Government of Pondicherry through its Secretary, Planning and Development Department issued a notice to the petitioner on 17th April, 1964 as to why action should not be taken against him for violation of the terms of the licence issued under the Non-Ferrous

*W.P. No. 717 of 1964 (P.). 11th September, 1964.

Metal Control Order and why the licence issued to him should not be cancelled. The petitioner has filed the present writ petition praying for the issue of a writ of prohibition directing the respondent the Government of Pondicherry, through its Secretary, Planning and Development Department not to take further proceedings under the show cause notice aforesaid. The grounds on which the petitioner seeks reliefs are :

(1) The provisions of the Non-Ferrous Metal Control Order had not been extended to the territory of Pondicherry in accordance with section 4 (2), clause (*a*) of the Foreign Jurisdiction Act.

(2) Section 4-A of the Non-Ferrous Metal Control Order, 1958, even assuming that it applies to the territory of Pondicherry envisages action to be taken only against an importer.

(3) The Non-Ferrous Metal Control Order now in force applies only to copper and does not extend to other metals like aluminium, tin, lead and zinc. Consequently the inclusion of the aforesaid metals in the action proposed to be taken against the petitioner under the notice is not proper.

The respondent filed a counter-affidavit alleging that investigation disclosed that the petitioner had pledged surplus stocks of the various metals specified in the notice with a banker at Madras and when the banker was contacted, some of these metals were found to have been disposed of. It is that circumstance that led to the notice issued to the petitioner. The allegations in the petition regarding want of jurisdiction were denied.

Taking up first, the last of the grounds mentioned above namely, that the Non-Ferrous Metal Control Order will not apply to metals other than copper, a reference may be made to the definitions of the Non-Ferrous Metals Control Order, 1958 (Central Rules and Notification, 1958). Sub-section (2) of section 1 states that it shall apply in the first instance to imported copper, but the Central Government may by Notification, in the Official Gazette, direct that it shall apply to any other imported non-ferrous metal. Learned Government Pleader appearing for the Pondicherry Government does not dispute the contention of the petitioner that such extension has not been made to the case of metals other than copper. To this extent, the contention of the petitioner is correct and the enquiry will have to be confined to the alleged contravention of the terms of the licence only in regard to the metal copper.

Taking up next the first ground, the contention of the learned Counsel for the petitioner is that while the Essential Commodities Act of 1955 (hereinafter called the Act) had been extended to Pondicherry by a Notification under section 4 (2) (*a*) of the Foreign Jurisdiction Act, no similar order had been passed under the aforesaid Act extending in terms the provisions of the Non-Ferrous Metal Control Order, 1958 issued under section 3 of the Act. According to the learned Counsel for the petitioner, every time an Order is passed or a rule is framed under the appropriate provisions of the Act, a separate Order or Notification should be issued simultaneously to make such orders applicable to Pondicherry territory which, at the relevant period, was administered by the Central Government under the Foreign Jurisdiction Act. With this proposition it is not possible to agree. The learned Government Pleader has submitted, and in my view rightly, that the orders issued under the Essential Commodities Act have got the same force as the Act itself, and forms part of the Act. Therefore it will be unnecessary to require separate Notifications under the Foreign Jurisdiction Act every time such Orders are promulgated or issued by the Central Government under the powers conferred upon it under the Essential Commodities Act of 1955. This contention has got the support of authority in *Ramananda* v. *The State*[1]. Therein Harris, C.J., dealt with a case which arose under the Essential Supplies (Temporary Powers) Act, 1946 and at page 125 he observed :

1. A.I.R. 1951 Cal. 120 (F.B.).

"These orders made under powers given in section 3 will override existing law because they are orders validly made under section 3 of the Act. *They are really part of the enactment* and impliedly repeal any existing law to the contrary." (italics mine).

Likewise, in a later decision reported in *Mustafa* v. *State of Mysore*[1], the Mysore High Court dealt with a prosecution under the Sugar Control Order. At page 376 of the Report the judgment contains the observation:

"It cannot be disputed that an order or rule made by virtue of the power conferred on such authority has to be considered as an integral part of such enactment."

It is clear that the orders issued under the Essential Commodities Act are part of the Act itself and, in my opinion, no fresh Notification will be necessary every time such an order is issued to make them applicable to the Pondicherry Territory to which the Act itself has been extended. The learned Government Pleader submits that the appellant is a licensee under the aforesaid Order, that he has received supplies of the various metals from the concerned authorities by virtue of the licence, and that having agreed to abide by the terms of the licence it is not open to him to contend that the order under which he was granted a licence was passed without jurisdiction. However, I do not rely on this submission for giving my finding under the first point, because even assuming that the appellant is a licensee under the order, it will be open to him to contend that the order is one passed without jurisdiction, as there cannot be any estoppel in such a case.

The final contention of the petitioner is that the Act will apply to importers, but the petitioner is not an importer. This contention overlooks the amendment to the Non-Ferrous Metals Control Order introduced on 4th December, 1959 whereby the word "importer" has been deleted in the several provisions of the earlier Orders and the word "a person" is substituted. After such amendment, it will not be open to the petitioner to contend that the Order applies only to importers. The petitioner got his licence in 1961 when the amended section was in force. This contention therefore has no substance.

In the result, the writ petition is allowed in part in so far as the enquiry is directed to be confined to the alleged contravention of the Order in regard to copper. There will be a prohibition by a writ for proceeding with the proposed enquiry in regard to other non-ferrous metals mentioned in the notice, for the reason that the Control Order has been extended only to copper and not to other non-ferrous metals. The petition is ordered to the extent mentioned above.

No costs.

V.K. ——— *Petition allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

Taj Mahal Transports (P.), Ltd., Malapalayam, Tirunelveli .. *Appellant* *

v.

The Secretary, Regional Transport Authority, Tirunelveli and others .. *Respondents.*

Constitution of India (1950), *Article* 226—*Writ of prohibition—Issue of—Principles—Application for variation of route under Motor Vehicles Act* (*IV of* 1939) *as amended by Madras Act* (*III of* 1964)—*Authority under that Act has jurisdiction to deal with application—Writ of prohibition cannot issue on ground that proposed variation is not one permitted under Motor Vehicles Act.*

Motor Vehicles Act (*IV of* 1939) *as amended by Madras Act* (*III of* 1964), *sections* 48 *and* 57—*Application for variation of permit—Death of applicant—Successor-in-interest if can continue application—Transport operator who came into existence subsequent to notification of above application under section* 57 (3) *and* (4)—*If precluded from being heard.*

The purpose of the writ of prohibition is to inhibit or restrain inferior Tribunals from usurping jurisdiction or proceeding patently beyond the bounds of jurisdiction. Though the writ is not a writ of course, it is a writ of right and not merely discretionary in character. Where the defect of jurisdiction is apparent on the face of the proceedings and the application is made by a party the order goes as of

1. (1963) 1 Cri.L.J. 372.

* W.A. Nos. 347 and 348 of 1964. 7th January, 1965.

right. The order, however, cannot be claimed as of right, unless the defect of jurisdiction is clear. The writ lies both for excess of jurisdiction and absence of jurisdiction. Where proceedings in an inferior Court are partly within and partly without its jurisdiction prohibition will lie against that which is in excess of jurisdiction. The existence of an alternative remedy in itself is *per se* no ground for declining to issue a writ of prohibition where it is patent that the inferior Tribunal was assuming a jurisdiction that it does not possess.

If there is jurisdiction over the matter before the Tribunal *prima facie* and facts canvassed before it one way or another may affect the issue as to the boundary of that jurisdiction, the Tribunal should be permitted to function and to determine its own jurisdiction; the writ should not issue to paralyse such an enquiry.

Under the Motor Vehicles Act (IV of 1939) as amended by Madras Act (III of 1964) the Regional Transport Authority can grant a variation or extension of route or area specified in a permit, provided that certain conditions are fulfilled, the application of which itself will depend upon the precise facts of the case and the wording of the enactment. Where, therefore, an application is made to the Regional Transport Authority under the Motor Vehicles Act for the variation of the route specified in a permit, a writ of prohibition cannot issue inhibiting the Regional Transport Authority from proceeding to deal with the application on the ground that the proposed variation is not one permitted under the provisions of the Motor Vehicles Act. The permissible character of the proposed variation would itself be one demanding scrutiny and the assessment of facts and the Regional Transport Authority would be acting within its jurisdiction in deciding that question for itself.

Where after the notification of an application for variation of a permit under section 57 (3) and (4) of the Motor Vehicles Act the applicant dies, his successor-in-interest would be entitled to continue the application of the original applicant without a fresh application or a fresh notification under the Act. The right of property embodied in a permit is transferable and heritable and such a devolution of interest must carry with it all incidental rights pertaining thereto such as the right to continue an application for variation by the original holder. For, apart from the property in the permit itself, the application can have no independent existence and is meaningless.

The absence of a provision in this regard in the Motor Vehicles Act or the Rules framed thereunder is immaterial. Even the most self-contained Code may exhibit lacunae in minor particulars and where the right is indisputable, the Tribunal will not be without inherent power to enforce or recognise the right.

Where an application for variation of a permit is sought to be continued by the successor-in-interest of the original applicant on his death, a transport operator who came into existence after the notification of the original application under section 57 (3) and (4) of the Motor Vehicles Act and who could not therefore put forward his objections to the proposed variation at that time, will not be precluded from being heard at the time of the disposal of the application on the ground that he did not raise his objections at the time of the notification of the original application. It is inconceivable how he can be precluded from advancing his objections when it is the successor-in-interest who is claiming the benefit of the variation sought for by the original application.

Appeals under Clause 15 of the Letters Patent against the Order of the Honourable Mr. Justice Srinivasan dated 10th November, 1964 and made in the exercise of the Special Original Jurisdiction of the High Court in Writ Petition Nos. 1466 and 1467 of 1964 presented under Article 226 of the Constitution of India to issue a writ of prohibition prohibiting the first respondent in each of the Petitions from granting the second respondents (in each of the petitions) application for variation of his route (*a*) Palayampatti to Tirunelveli Junction so as to touch Melapalayam in W.P. No. 1466 of 1964 and (*b*) High grounds to Melapalayam as High grounds to Tirunelveli Junction.

K. K. Venugopal, for Appellant.

K. Rajah Aiyar for *K. Thirumalai*, for 2nd Respondent.

D. Raju for the Additional Government Pleader, on behalf of 1st Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—These related appeals, which are upon practically identical facts, have been instituted from the judgment of Srinivasan, J., in W.P. Nos. 1466 and 1467 of 1964, under the following circumstances. In both the appeals, the appellant is Taj Mahal Transport (P.), Ltd., a stage-carriage operating concern in Tirunelveli District. There was a particular route, Palayapettai to Tirunelveli Junction (*via*) Tirunelveli Town and Kurukkuturai, for which two permits had been assigned. In 1961, a certain Muthiah Asari was the holder of the permits. The appellant concern has a bus relating to another permit and route, namely, Tirunelveli Town to Melapalayam (*via*) Kurukkuturai and Melanatham.

This route and the route relating to the permits of Muthiah Asari, to which we have just referred, have both a common sector of one mile between Tirunelveli Town and Kurukkuturai. Muthiah Asari applied for a variation of the route of his permits, so as to enable him also to ply between Kurukkuturai and Melapalayam. The contention of the appellant is that if this variation be permitted, it would virtually amount to an operation by Muthiah Asari on the identical route for which the appellant has the sanction to operate.

The application by Muthiah Asari for variation of the route was duly notified under the Motor Vehicles Act, but, on that date, the appellant concern had not become an operator on the route Tirunelveli Town to Melapalayam. Hence, the appellant had no opportunity to advance objection to the approval of the proposed variation. After the appellant obtained his permit, he was served with notice in the proceedings by the Regional Transport Authority, in respect of the proposed variation ; in the meantime, R. Subba Reddi (second respondent) had become the transferee of the property rights of Muthiah Asari. Admittedly, Subba Reddi (second respondent) made no independent application, nor was there any notification of such application. He has throughout been seeking to continue the notified applications of Muthiah Asari for variation, claiming to be the successor-in-interest by virtue of the transfer recognised under rule 196 of the Madras Motor Vehicles Rules, and the succeeding rules specifying the procedure.

It was in this situation that the Taj Mahal Transports (P.), Ltd. instituted these writ proceedings before the learned Judge (Srinivasan, J.) for a writ of prohibition, on the following grounds. Firstly, it is strenuously contended that the proposed variation is not one permitted by the Amended Act, within the ambit of the powers of the Regional Transport Authority. Since, in effect, the approval of such a variation will gravely prejudice the appellant concern, by inevitable competition for the number of trips on the identical route, this attempt by the Regional Transport Authority to assume a jurisdiction that the Authority does not possess, should be restrained by the issue of a writ of prohibition. It is the law that such a writ can issue to restrain an inferior Tribunal from proceeding beyond its jurisdiction, or erroneously assuming jurisdiction ; the writ is of right, and the existence of an alternative remedy, after the variation has been granted, through a statutory appeal, is no bar to the issue of the writ. A writ ought to issue in order to prevent the mischief. Secondly, there has been no independent application by Subba Reddi (second respondent), which has been notified under the law. The second respondent cannot claim to be the successor-in-interest of Muthiah Asari, entitled to continue the applications of that individual for the variation. The Motor Vehicles Act is a self-contained Code, with its own procedure and under the provisions of the Act and the Rules thereunder there is no provision for the continuance of such a notified application by a successor-in-interest, and, in the absence of such a provision, the continuance will be illegal. These are the main grounds upon which the issue of the writ of prohibition, in these two related cases, which are identical on the facts, was sought for by the appellant.

Per contra, what was really in the nature of a preliminary objection was sought to be urged on behalf of the second respondent. This was simply to the effect that since, admittedly, objections had not been urged to the applications for variation by the appellant concern under section 57 (3) and (4) of the Act, though this might be inevitable since the appellant concern was not a stage-carriage operator at all in this area in 1961, the appellant concern was precluded altogether from being heard. This is upon the authority of the dicta in *Purushottam Bhai Punnam Bhai Patel* v. *The State Transport Appellate Authority, Madhya Pradesh and others*[1].

The learned Judge has referred to, and discussed, all these related aspects, in his judgment. He has considered the effect of Madras Act (III of 1964), amending both sections 48 and 57 of the Motor Vehicles Act, following the observations of this Court in the Full Bench decision in *Natesa Mudaliar* v. *Dhanapal Bus Service*[2], particularly

1. C.A. No. 762 of 1963 of the Supreme Court.
2. (1964) 2 M.L.J. 23 : I.L.R. (1964) 1 Mad. 288 : A.I.R. 1964 Mad. 136 (F.B.).

the enunciation of the law that a route was not a condition of a stage-carriage permit, and that section 57 (8) was not a substantive provision enacting the terms of a stage-carriage permit, but only a rule of procedure. On the question whether Subba Reddi (second respondent) could continue the application of Muthiah Asari, the learned Judge was inclined to think that this could be done, on the authority of *Kuppuswami* v. *Ramachandran*[1], a decision to which one of us was a party. In any event, the learned Judge thought that it would be difficult to substantiate the contention that the proposed variation was not one permitted by law, wihin the competence of the power of the Regional Transport Authority. Without finally deciding this point, he was of the view that this should be left to the Tribunal, and could not be assumed to be a matter of erroneous jurisdiction, justifying the issue of writ of prohibition. The learned Judge was also quite clearly of the view, on the authority of *Purushottam Bhai Punnam Bhai Patel* v. *The State Transport Appellate Authority, Madhya Pradesh and others*[2], that the appellant concern could not object at all, not having raised these objections at the time of the notification under section 57 (3) and (4) of the Act.

There can be no doubt that the arguments, which we have tersely set forth above, do involve certain significant and interesting questions of fact and law. First, there is the question whether the proposed variation is one within the ambit of the power of the Regional Transport Authority. If, patently, that is not the case, the contention is at least conceivable that the Authority should be restrained by a writ of prohibition. The purpose of this writ is to inhibit or restrain inferior Tribunals from usurping jurisdiction, or proceeding patently beyond the bounds of jurisdiction. But, on the contrary, if this question of the permissible character of the variation is itself one demanding scrutiny and the assessment of facts, a very important principle is involved in allowing the writ of prohibition to proceed in such a case. For, it could well be mainained that a Tribunal has the jurisdiction and power to investigate the existence of its own jurisdiction or the absence of it; that the Tribunal would do so and arrive at an erroneous conclusion, cannot be assumed. If this is not permitted, quasi-judicial Tribunals simply cannot function, for parties could seek to stifle them by writs of prohibition sought for on the ground of a possible absence or excess of jurisdiction, as constraining this Court, under Article 226 of the Constitution, to investigate and to decide this matter, on the merits, in every case. Beyond doubt, this aspect of principle is of some importance and, for this reason, it might be necessary to refer, briefly, to the catena of decisions available on this aspect and the vicissitudes of the writ of prohibition in the United Kingdom. There is, next, the question whether the second respondent can be recognised as a transferee for the purpose of continuing as successor-in-interest, the applications originally filed by Muthiah Asari. Admittedly, the second respondent has filed no independent applications, nor have such applications been notified. Thirdly, and lastly, there is the question whether the appellant concern should be precluded from advancing its objections, because it did not object and, indeed, could not have objected when the applications of Muthiah Asari were notified under section 57 (3) and (4) of the Act.

We are of the view that the question whether the proposed variation is one within the ambit of the power of the Regional Transport Authority, cannot be decided *ex facie*, upon admitted facts on record, and without the assumption by this Court of the task of an enquiry, which is by no means germane to writ jurisdiction. The relevant aspect of this matter can be stated as follows. Following *Natesa Mudaliar* v. *Dhanapal Bus Service*[3], the Legislature enacted (Madras Act III of 1964) introducing amendments both to sections 48 and 57 (8) of the Motor Vehicles Act (IV of 1939). Part of the amendment to section 48 enabled the Regional Transport Authority to vary, extend or curtail the route or routes or the area specified in the permit. But an important saving clause was also enacted, both is the case of variation and in the case of extension. In the case of variation, the saving clause was that " the termini shall not be altered, and the distance covered by the variation shall not exceed twenty-four kilometres". In the case of extension, the provision was that " the distance covered by the extension shall not exceed twenty-four kilometres from the termini".

1. (1963) 2 M.L.J. 355 : I.L.R. (1963) Mad. 627.
2. C.A. No. 762 of 1961 of the Supreme Court.
3. (1964) 2 M.L.J. 23: I.L.R. (1964) 1 Mad. 288: (F.B.).

In addition to this, in section 57 (8) of the Act, which, as originally stood, related to an application to vary the conditions of a permit by including a new route or routes, or a new area, etc., the words "or by the variation, extension or curtailment of the route or routes or the area specified in the permit" were introduced. The argument of Sri Venugopal for the appellant concern may now be briefly stated; it is best appreciated by a reference to the sketch included in the typed-papers, the accuracy of which is not in dispute. According to the learned Counsel, the proposed variation is not a permitted one, for the simple reason that the two termini of the original permit namely, Palayapatti and Tirunelveli Junction, are not retained intact. On the contrary, a new terminus is introduced, namely, by the route Palayapatti to Melapalayam, and the other terminus Tirunelveli Junction is abandoned. Nor is this a permitted extension within the terms of the proviso. For this reason, the Regional Transport Authority would have no jurisdiction to grant this kind of variation or extension, whichever it might be termed. Such an absence of jurisdiction justifies the argument that the mischief of the possible grant of the variation ought not to be permitted to occur. A writ of prohibition should proceed even before this is done.

Obviously, the very argument carries with it its own refutation, in the sense that it demonstrates that there is no patent lack of jurisdiction, as has been argued. On the contrary, the amendment to section 57 (8) and the amendment to section 48, introduced by Madras Act III of 1964, enable the Regional Transport Authority to grant a variation or extension of a route covered by a permit, as the case may be upon application, and after hearing objections by those affected. Certainly, there are saving provisions enacted in section 48 itself. But, it is at least a conceivable argument that these do not affect the generality of the power under section 57 (8) of the Act. This apart, it is exclusively a question of fact whether the provisos apply, or do not, in a particular case. In the present case, at least with regard to the proposed alteration, viewed as an extension, it may be a maintainable argument that the Authority would have power, under statute, to grant this variation. We are in entire agreement with the learned Judge Srinivasan, J., that we ought not to anticipate the Tribunal, in its decision upon this mixed question of fact and law. But, we are quite unable to see how it could be contended that the question admits of no controversy in decision, and that it really exposes a patent and basic absence of jurisdiction.

This takes us to the matter of the history of writ of prohibition in England, and the kind of situation in which the restraint of inferior Tribunals by the issue of such a writ would be appropriate and justified.

In Halsbury's Laws of England (Simond's Edition), Volume 11, at pages 115 and 116 the effect of the numerous decisions on this aspect has been set forth in a few terse and clear propositions of law. Though the writ of prohibition is not a writ of course, it is a writ of right, and not merely discretionary in character. Where the defect of jurisdiction is apparent on the face of the proceedings, and the application is made by a party, the order goes as of right. The order, however, cannot be claimed as of right, unless the defect of jurisdiction is clear. The writ lies both for excess of jurisdiction, and absence of jurisdiction. Where proceedings in an inferior Court are partly within and partly without its jurisdiction, prohibition will lie against that which is in excess of jurisdiction :

> ".......... Where the Judge for the purpose of ascertaining whether he has or has not jurisdiction, has decided a question of fact on conflicting evidence, the Court will not interfere except on very strong grounds ...."

Again,

> "In any event, where the jurisdiction of the inferior Court depends on the judicial determination of facts, the order does not lie, until the Court has wrongfully on these facts given itself jurisdiction.

Certain observations of great interest upon the history of this writ, will be found in passages in *The Mayor and Alderman of the City of London* v. *Richard Henry Cox*[1], Apparently, at the close of the seventeenth century, the writ was considered to be purely

1. (1867) L.R. II, English-Irish and Appeal Cases 239.

within the discretion of the Court. There was a conflict of case-law on this aspect, but later in *Burder* v. *Veley*[1], the Judges held that if a Court of inferior jurisdiction exceeded it, the writ was bound to issue, though there was a possibility of later correction of the defect by appeal. But the writ was not a writ of course, like a writ of summons in an ordinary action. Where an inferior Court proceeds into a cause properly within its jurisdiction, prohibition cannot be awarded, till the pleadings raise some issue which the Court was incompetent to try. But, if the foundation for jurisdiction was itself defective, prohibition could be immediately applied for. In *The Queen* v. *Justices of Kent*[2] Lord Coloridge, C.J., stated that "if justices have jurisdiction over the subject-matter of the proceedings before them, a prohibition cannot be issued upon the ground that they may make a mistake in law in exercising their jurisdiction". A comparatively recent pronouncement in *R.* v. *Tottenham Rent Tribunal*[3] by Lord Goddard, C.J., is of great interest on this aspect. The learned Chief Justice observed :

"It would not be at all desirable to lay down any definite rule when a person should go to the tribunal or when he should come here for prohibition where the objection is that the tribunal has no jurisdiction .... For myself, I should say that where there is a clear question of law not depending on particular facts .... there is no reason why the applicants should not come direct to this Court for prohibition rather than wait to see if the decision goes against them, in which case they would have to move for *certiorari*."

Turning to the cases in this country, we find certain observations of Satyanarayana Rao, J., on behalf of the Bench in the *Shirur Mutt case*[4], in relation to the writ of prohibition. The learned Judges observed :

"A writ of prohibition lies to prevent an inferior tribunal from exceeding its jurisdiction or even from assuming a jurisdiction which does not vest in it under law .... In deciding the question, whether a writ of prohibition should issue or not, the existence of an alternative remedy is, in our opinion an irrelevant consideration ...."

In *Bengal Immunity Co.* v. *State of Bihar*[5], the Supreme Court observed that the existence of an alternative remedy may be very material in the context of a writ of *certiorari*, but where an inferior Tribunal is shown to have usurped jurisdiction which does not belong to it, that consideration is irrelevant, and the writ of prohibition has to issue as of right. In *Calcutta Discount Co.* v. *I. T. Officer*[6], their Lordships were again dealing with an argument that the Tribunal or quasi-judicial Authority could itself dispose of the issue of jurisdiction ; the proposition was affirmed that the existence of an alternative remedy, in itself, was *per se* no ground for declining to issue ; writ of prohibition, where it is patent that the inferior Tribunal was assuming a jurisdiction that it did not possess.

We have referred to these principles a little extensively, for an important reason. The corpus of Administrative Law is growing apace, and, every day, many quasi-judicial and statutory Tribunals, which are subject to the jurisdiction of this Court under Article 226 of the Constitution, have to function and dispose of multiple proceedings before them ; in many of these proceedings it is conceivable that, *inter alia* a contention relating to excess of jurisdiction, involved in the grant of the relief sought for by a party, who might be affected by such a possible decision, can be permitted to come up to this Court and asks for prohibition to go, though it might be perfectly probable that the inferior Tribunal would have jurisdiction, upon facts being established in a particular way; this would really imply that many proceedings quite within the competence of such Authorities, or which may be ultimately found to be comprised in the jurisdiction, may be stifled at the outset. We do not think that that would be the proper province of the exercise of the power of this Court to issue this writ under Article 226 of the Constitution. If there is jurisdiction over the matter before the Tribunal *prima facie* and facts canvassed before it, one way or another, may affect the issue as to the boundary of the jurisdiction, we think that the Tribunal should be permitted to function, and to determine its own jurisdiction ;

1. 12 Ad. & E. 263.
2. (1890) 24 Q.B.D. 181 at 183.
3. (1956) 2 All E.R. 863 at 864 and 865.
4. (1952) 1 M.L.J. 557 at 578.
5. (1955) 2 M.L.J. (S.C.) 168 : (1955) S.C.J. 672 : A.I.R. 1955 S.C. 661.
6. (1963) 1 S.C.J. 741 : A.I.R. 1961 S.C. 372 at 380.

the writ should not issue to paralyse such an enquiry. In the present case, the argument is put strongly against the issue of the writ. For, under the Act as amended, the Authority can certainly grant such a proposed variation or extension, provided that certain conditions are fulfilled, the application of which itself will depend upon the precise facts of the case, and the wording of the enactment. We have already stressed that, at least viewed as an extension, it is by no means clear that the proposed variation is one that cannot be granted by the Authority. Hence, we entirely agree with the conclusion of the learned Judge that this is not a proper case at all for the issue of a writ of prohibition.

The next argument of Sri Venugopal for the appellant can be quite briefly dealt with. Indisputably, the Motor Vehicles Act and the Rules framed thereunder, may be termed a comprehensive and complete Code, and, ordinarily, there should be no need to invoke the provisions of other enactments of the processual law, such as the Code of Civil Procedure. But, where, under this Act, the transfer of a permit is not merely recognised, but a procedure is prescribed for such recognition, the question is with regard to the recognition of this substantive right and the incidents thereto, and not merely whether some rule has or has not been framed to enable the transferee to continue the application for a variation of the permit originally filed by his predecessor-in-interest. Even the most self-contained Code may exhibit lacunae in minor particulars, and, where the right is indisputable, the Tribunal will not be without inherent power to enforce or recognise the right. In *Kuppuswami* v. *Ramachandran*[1], the Bench specifically held that a revision proceeding against an order declining to grant a variation, may be continued by the legal representative of the deceased applicant ; on a parity of reasoning, the second respondent would certainly be entitled to continue the applications of Muthiah Asari. The main point is that the right of property embodied in a permit is transferable and heritable, that this has been recognised, and that such a devolution of interest must carry with it all incidental rights pertaining thereto, such as the right to continue an application for variation by the original holder. For, apart from the property in the permit itself, the application can have no independent existence, and is meaningless. Nor is it essential that, where such a continuance is permitted, there should again be a notification under section 57 (3) and (4) of the Act. This point has also to be held against the appellant.

But, with great respect to the learned Judge, we are unable to agree with him that, on the authority of the dicta in *Purushottam Bhai Ponnam Bhai Patel* v. *The State Transport Appellate Authority, Madhya Pradesh and others*[2], it follows that the appellant cannot be heard at all with regard to the objections to the proposed variation. On the contrary, the facts of that appeal before the Supreme Court were very different, and the decision is totally distinguishable. That was a case in which a concerned society had applied only for one permit, and it put forward no representations whatever with regard to the other route, under section 57 (3) and (4) of the Act, though it could well have done so. Since the objections of the society were not notified in time, the society could not intervene and object with regard to the other route, at any stage of the proceedings. The facts here are widely different. The appellant was not in existence as a stage-carriage operator at the time of the notification of the proposed variations, and, naturally enough, no objections were then filed by him. Had it been a mere question of delay in the hearing of those applications by the original applicant Muthiah Asari, we certainly agree that the appellant should be precluded from advancing any objection. But the present situation is that the applications are being continued by an alleged successor-in-interest. If we suppose a case in which the successor-in-interest has no *locus standi*, though he may claim it, it will at once be obvious that the Authority of the Judgment of the Supreme Court referred to above, would have no application to that kind of context. Objections can relate either to the proposed variation, or to the capacity of the party to claim to be entitled to continue the application, or may be even personal to party, the such as unfitness upon any ground of public interest. It is very important to note that

1. (1963) 2 M.L.J. 355 : I.L.R. (1963) 1 Mad. 27 : A.I.R. 1964 Mad. 356.
2. C.A. No. 762 of 1963.

though the appellant became a stage-carriage operator subsequent to the Notifications of the applications of Muthiah Asari, his existence has not been ignored; he has been given notice by the Regional Transport Authority, when the successor-in-interest claimed to continue those applications. He has thus a right to be heard, nor is it conceivable that such a right can be restricted to some particular aspect of objection, such as objections personal to the successor-in-interest. We are quite unable to see how the appellant can be precluded from advancing his objections, when it is the successor-in-interest who is claiming the benefit of the variation sought for by the original applications.

Under the circumstances, the Writ Appeals fail and are dismissed. But we desire to make it clear that no part of our observations in the judgment must be construed as final on the issue of jurisdiction, or the permitted nature of the variation. Those matters must be decided by the Regional Transport Authority, independently on the facts and the law, and the parties will, of course, have liberty to work out their further remedies as provided for by the law. No order as to costs.

V.K. — *Appeals dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI.

Eagle Star Insurance Company, Ltd., Madras .. *Appellant**

v.

L. Moolchand and others .. *Respondents.*

Railways Act (IX of 1890), sections 72 and 75—Respective scope—Liability of Railway for loss of part of the goods consigned—When arises.

Section 72 of the Railways Act no doubt imposes an absolute liability on the Railway administration for loss, destruction or deterioration of goods delivered to them as carriers and subject to the provisions of the Act, the responsibility of the Railway is that of a bailee under the provisions of the Contract Act. In order to sustain a claim under this provision the plaintiff should not only prove the loss or deterioration of the goods entrusted to the carrier but should also prove that the carrier failed to take as much care of the goods as a man of ordinary prudence would.

But section 75 of the Railways Act is of special application. The whole purpose of the section is that the Railway should be informed of the special value of the goods entrusted for carriage and therefore of the additional risk of the Railway in consideration of which a higher charge is required to be paid. The section will cover also partial loss of goods contained in any parcel or package of the specified type. It will be defeating the very purpose of the section if it is held to apply only in cases of total loss of the entire goods consigned and not to cases where only a part of the goods is lost. But the section could be invoked only if the declaration is made according to its provisions.

Appeals against the Decree of the III Assistant Judge, City Civil Court, Madras dated 17th September, 1960, and passed in Original Suit No. 426 of 1957.

J. S. Vedamanickkam, C. V. Nilakantan and *S. S. Ramachandra Ayyar*, for Appellant.

V. Venkatesseshayya, for Respondents.

The Judgment of the Court was delivered by

Veeraswami, J.—The 1st respondent who is common to both the appeals and who was the plaintiff, instituted the suit for recovery of Rs. 6,570-1-0 with interest, being the value of the goods short-delivered as per the particulars given in Schedule B to the plaint. On 22nd December, 1955, a case containing cutlery and certain other goods detailed in Schedule A to the plaint, said to be of the total value of Rs. 7,084-7-0, was consigned to the first respondent from Madras Central to Howrah Railway Station on the 1st defendant Railway by Messrs. Moolchand Mittalal, Madras. The goods were insured with the 4th respondent, Eagle Star Insurance Company, Limited, George Town, Madras, whose Head Office is stated to be at Bombay. The corresponding policy bears the date 24th December, 1955, and covers rail risk, including risk of theft, pilferage and non-delivery. At the destination, it was found, about 26th December, 1955/27th December, 1955 that the parcel had been tampered with and part of the goods missing. The same day, the 1st respondent asked the Howrah Station Master, by letter, to survey the loss and

* Appeals Nos. 281 and 401 of 1961. 24th March, 1965.

make an open delivery of the packet and marked and sent a copy of this letter to the Calcutta Branch of the Insurance Company. But that Branch wrote back the next day to the respondent advising him to arrange for Messrs. Norman Steward & Company to act as surveyors on behalf of the company in the particular case. Actually, on 30th December, 1955, Norman Steward & Company made a survey of the loss of the respondent.

It appears that in the meantime the respondent had taken open delivery of the damaged packet and moved it to his premises for the purpose apparently of the survey by Norman Steward & Company. On 3rd January, 1956, the Howrah Station Master, on inspection of the damaged packet, issued a certificate of the loss of part of the goods consigned from Madras. On 21st January, 1956, the respondent preferred his claim to the Chief Commercial Superintendent, Eastern Railway, Calcutta. On 2nd January, 1957, he had also made a claim on the Insurance Company for payment of value of the loss under the terms of the cover. The Insurance Company did not reply immediately, but the 1st defendant however, intimated that the matter would be enquired into. As the demand was not met, the respondent eventually brought the suit against both defendants 1 to 3, Union of India, and the 4th defendant, Insurance Company.

The 1st defendant filed a written statement admitting that the parcel was received at the destination in a tampered condition and that open delivery of the consignment was given to the respondent as alleged by the latter in the plaint. The 1st defendant further admitted that some of the articles in the parcel were lost in transit, but denied its liability under section 75 read with the Second Schedule to the Railways Act, on the ground that the respondent had failed to make a declaration of the value of the contents of the parcel and pay the required percentage on the value so declared by way of compensation for the increased risk. The 4th defendant in its written statement denied liability on the ground that under the terms of the policy survey was required to be made by the Station Master of Howrah and none else and that such a survey was not made in the instant case. It would assert that the survey made by Messrs. Norman Steward & Company was not binding on it by any means. The 4th defendant also averred that the claim on it was ever made. But this seems to be a mistake as in point of fact, as we already mentioned, the respondent had, as early as 2nd January, 1957, made a demand on the Madras Branch of the Insurance Company for payment of the value of the loss. On these pleadings and certain others which are not material to our present purpose, a number of issues were framed by the Third Assistant City Civil Judge, and finding most of them in favour of the respondent, decreed the suit against defendants 1 to 4. The learned trial Judge was of the view that the 1st defendant's contention, that in the absence of declaration, the respondent could not invoke the liability of that defendant under that section, was not well founded, because, as he thought, the section would apply only if the entire package had been lost and not a portion of its contents. On the question of survey of the goods raised by the Insurance Company, he answered it in favour of the respondent.

In the appeal preferred by the Insurance Company, its learned Counsel has reiterated the plea in the written statement. He urges that a survey of the loss of goods under the terms of the policy should only be by the Howrah Station Master and at the station itself, and, since this condition has not been complied with, no liability arose under the cover. The terms of the policy issued to the respondent are briefly these. The insurance related to one wooden case with iron bands and wrapped with gunny and again iron bands around the case containing merchandise of various types as per invoice despatched from Madras Central to Howrah. The cover included rail risk "as per clause attached". The risk clause extended to risk of theft, pilferage and non-delivery, again "as per clauses attached". The clauses attached, as far as may be relevant, only state that the policy covered the risk of theft and/or pilferage irrespective of percentage. The attached clause further stipulated that no liability for loss was to attach unless notice of survey had been given to underwriters agents within 10 days of the expiry of risk under the policy. The policy required that survey, if any, to be made by the Station

Master at Howrah. It is not clear from the terms of the policy whether the requirement that survey should be made by the Station Master at Howrah is a condition to the risk arising under the policy. We shall, however, assume that it is a condition. Even so, it seems to us that it has been complied with substantially. As already noticed at the outset, on 27th December, 1955, itself the respondent wrote to the Station Master, Howrah, for making a survey and an open delivery of the damaged packet, of which a copy was sent to the Howrah Branch of the Insurance Company. The Howrah Branch promptly replied the next day requesting the respondent to arrange for Messrs. Norman Steward & Company to act as surveyors on behalf of the Insurance Company itself. Probably in view of this, the respondent did arrange for such a survey and the records show that Norman Steward & Company surveyed the goods at the premises of the respondent on 30th December, 1955, and made a report of the loss. It is significant to note that factually the loss of a portion of the goods is admitted by the 1st respondent and the 4th respondent has not seriously denied the fact. Mr. Vedamanickam for the appellant, Insurance Company, argued that the advice of the Howrah Branch is not binding on the company. We are unable to appreciate this argument. The Howrah Branch clearly took up the position that it had the authority and advised the 2nd respondent to have such a survey by Messrs. Norman Steward & Company. Not a word has been said or proved that there was anything wrong in the survey made by Messrs. Norman Steward & Company. What is even more important is that, as a matter of fact, on 3rd January, 1956, the Station Master at Howrah himself issued a certificate relating to the loss of goods in question in course of transit. This was clearly in any case a substantial compliance of the requirement, that the survey should be made by the Station Master at Howrah. But it is argued for the Insurance Company that this survey by the Station Master was made only after the package had been brought back from the respondent's premises to the Station for the purpose. Learned Counsel says that what is contemplated by the policy is a survey by the Station Master at the premises of the Station before the goods are removed. There is no such requirement so expressly provided in the policy. All that the policy says is that a survey should be made by the Station Master at Howrah and nothing more. We can understand the contention of the Insurance Company if there was any bad faith alleged or proved on the part of either the Station Master at Howrah or Messrs. Norman Steward & Company. We cannot but observe that in this case the Insurance Company has taken a stand which is unwarranted and not justified by the circumstances of the case. We hold that the survey clause in the policy has been fully complied with in the instant case.

On the view we have taken of the liability of the Railway in the other appeal, learned Counsel for the Insurance Company argued that the liability under the insurance cover is dependent on and co-extensive with the liability of the carrier. In support, learned Counsel invited us to the following clause in the policy :

"Warranted free of any claim in respect of goods shipped under a bill of lading or contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods, but this warrantee shall apply only to claims for which the carrier or other bailee is liable under the bill of lading or contract of carriage."

It is obvious that this clause in the policy does not support the claim of the Insurance Company. This warrantee clause will apply only to a case in which a contract of carriage stipulating that the carrier or other bailee shall have the benefit of any insurance on such goods. That is not the case here and there is no such contract. The appeal of the Insurance Company must therefore fail.

The other appeal of the Railway seems to us to be based on a more substantial ground. We have already mentioned the defence on its behalf, which did not find acceptance with the trial Judge. The argument before us for the Railway is that the packet contained, among other things, goods which fall within the purview of Schedule II to the Railways Act and that under section 75 of that Act in order that the Railway may be made liable, the value of the goods, if it is in excess of Rs. 300 before this provision was amended, should be declared and a percentage

calculated on the declared value should be paid in consideration of the additional risk borne by the Railway in respect of such goods. It is common ground that no such declaration was made. The Court below was of the view that section 75 would apply only if the entire package had been lost. We fail to see the point of it. If the section applied and no declaration has been made, the respondent cannot rely on the section. If the section applies only to a total loss of a packet, then too it will be of no assistance to the respondent. But we find that the respondent solely relied on the risk arising under section 75. So much is clear from the terms of his plaint. We are unable to accept the view that section 75 will apply only to a total loss of package and not if only part of the goods contained therein has been lost. No doubt, sub-section (2) of section 75 says :

"When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed or has deteriorated, compensation will be recoverable in respect of such loss subject to the rule as to burden of proof laid down in that sub-section."

But any parcel or packet in this sub-section as well as sub-section (1) of section 75 has reference to the goods contained therein; for, the value to be declared is in relation to them, so that the goods in the parcel will include also part thereof. The whole purpose of section 75 is that the Railway should be informed of the special value and therefore of the additional liability the Railway will have to undertake in carrying such goods and in consideration of the additional risk a higher charge is required to be paid. That being the purpose, it will be defeating it if the risk of the Railway arose only for the entire packet, in the sense that the entire goods had been lost and not merely a part of the goods. In our view, sub-sections (1) and (2) of section 75 will cover also partial loss of goods contained in any parcel or package of the specified type. The respondent can take advantage of section 75 only if he had declared the value of the goods, which he had failed to do. His claim, based on section 75, must therefore fail.

Learned Counsel for the respondent, however, argued that since the Railway has admitted the loss of part of the goods, it must automatically follow that the Railway, as a bailee and as a carrier, must make good the loss. But the respondent has not based his claim in the plaint on section 72 of the Railways Act. That section provides for the responsibility of a Railway Administration for the loss, destruction or deterioration of goods delivered to the administration to be carried by railway and such responsibility is subject to the other provision of the Act, to be that of bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872. Section 151 of the Contract Act says that in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The following section is to the effect that a bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken an amount of care of it described in section 151. It is obvious therefore, that the respondent, in order to succeed on the basis of section 72 of the Railways Act, should not merely show that there was a loss of the goods entrusted to the carrier, but that the loss was due to the fact that the carrier had failed to take as much care of the goods bailed as a man of ordinary prudence would. As we mentioned, there is not only no pleading of any such character in the plaint, but the parties do not appear to have gone to trial on that basis and our attention has not been invited to any evidence which will bear on the question of the care statutorily required of a bailee like the carrier here.

It follows that the respondent's claim against the 1st defendant Railway, which will include defendants 2 and 3, should fail. A.S. No. 281 of 1961 is dismissed with costs and A.S. No. 401 of 1961 is allowed, but in the circumstances with no costs.

R.M. — *A.S. No.* 281 *of* 1961 *dismissed and A.S. No.* 401 *of* 1961 *allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI.

Mrs. W. Kannia Lal and others .. *Appellants* *

v.

The Collector of Madras .. *Respondent.*

Land Acquisition—Compensation for undeveloped land—Basis of—Deduction for formation of road—If permissible.

Where the value of an undeveloped land in a developed area is to be assessed on a comparison with the value of the latter, the process of estimating should necessarily involve deduction of the cost of the factors required to bring the undeveloped land on a par with the developed lands, where a large extent of land is acquired for being laid out into smaller plots, as house sites, allowance will have to be made for the space which will be taken up for roads and the cost of the rest of the amenities including the costs of laying roads as without such roads the land cannot be valued as house sites.

An extent of 20% of the total extent acquired may be a reasonable deduction for the roads in the absence of any specific data.

Though the price paid for a small plot of land cannot normally be the sole basis for determining the market value of a large extent, still the Court can take into consideration that price and also the fact that prices should have gone up in the course of years since the sale of that small plot. The market value of plot abutting the main road will necessarily have to be higher than the value of plots in the interior.

Appeal against the decree of the II Assistant Judge, City Civil Court, Madras dated 8th October, 1960, in L.A.C. No. 27 of 1959.

N. Nagaraja Rao, for Appellants.

The Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Veeraswami, J.—Claimants 1 to 11 in the land acquisition proceedings are the appellants. A total extent of 3 cawnies, 7 grounds and 661 sq. ft., comprised in R.S. No. 2381/88 in Mylapore was acquired compulsorily under the provisions of the Land Acquisition Act for construction of quarters for the staff of the Police Department. The notification under section 4 (1) was made on 29th January, 1958. On the basis of a sale dated 11th May, 1957, of an extent of 2046 sq. ft. for Rs. 2,500 in R.S. No. 2195/1, 4 and 5 in Mylapore, which works out at the rate of Rs. 2,932 per ground, the Land Acquisition Officer allowed compensation at the rate of Rs. 2,130 per ground, after deducting 25 per cent of the area for providing roads and Rs. 800 per ground for meeting the cost of laying roads. He awarded Rs. 1,26,642.70 nP. at that rate for the extent of 2 cawnies, 11 grounds and 1,096 sq. ft. On a reference to the City Civil Court under section 17 of the Land Acquisition Act the learned Assistant Judge of that Court raised the compensation payable for the land abutting the Bazaar Road to Rs. 3,000 per ground, and for the rest at the rear of it to Rs. 2,200 per ground. He also reduced the extent to be allowed for roads to 20 per cent. But he agreed with the Land Acquisition Officer as to the cost per ground of laying roads. Claimants 1 to 11 alone aggrieved by this decree have come up to this Court.

It is contended that on the basis of the sale deed, Exhibit C-1, dated 19th November, 1953, they should have been granted Rs. 5,000 per ground for the area abutting the main road, which is of an extent of 4 grounds and 1,900 sq.ft. We accept the contention. The plot sold under Exhibit C-1 is also abutting the main road and is of an extent of about 3 grounds. We see no reason why this should not be taken as the basis. Clearly the rate fixed by the Court below is too low. Though Exhibit C-1 related to 1953 and the value in the following years should have appreciated, on a consideration of all the circumstances, Rs. 5,000 per ground for the said area abutting the main road will in our opinion be reasonable.

The next question is whether, as contended for the appellants, the Court below was right in deducting 20 per cent of the total area for laying roads and Rs. 800

* Appeal No. 400 of 1961. 24th March, 1965.

per ground towards the cost of laying roads in fixing the market value for the remaining land. The land is situate undoubtedly in a developed and a busy locality but is by itself undeveloped as it is away from the main road. Extensive as it is, it has to be plotted out into smaller house sites with amenities. These amenities will consist of roads, drainage, lighting and so on, and roads will require space and laying of roads will mean expenditure. In such a case, therefore, before valuing the land as house site, allowance will have to be made for the space which will be taken up for roads and the cost of the rest of the amenities, including the cost of laying roads. This principle has been recognised in *Madras State* v. *Balaji Chettiar*[1] in which this this Court observed :

"Roads cannot be laid without space and huge blocks of lands cannot be split into building plots and valued per ground without roads. Nor can they be treated as developed lands without deducting such space. So, the space required for roads is something different and additional to the cost of laying roads themselves and providing other amenities like electricity, water, underground drainage, etc., So, the deduction of 25 per cent. in this appeal and of 10 per cent. in A.S. No. 1953 was correct."

The same method of valuing lands at the rear which are undeveloped when compared with lands abutting a main road was adopted in *State of Madras* v. *Sri Raja Rao Venkata Kumara Mahipathi Surya Rao Bahadur Varu*[2]. In *Additional Special Land Acquisition Officer* v. *S.S. Ghole*[3] it was pointed out :

"In assessing the market value on the basis of a hypothetical scheme for residential buildings by laying out the land into plots, it is not what the claimant may have expected to receive by sale of one or two plots out of the land which is to be decisive of the value of the land, but what the valuer may regard as the value of the plots aggregated after taking into consideration the expenses of providing the amenities which the purchasers may normally expect to obtain in the sector in which the land is situate."

With respect, we agree with these observations. Where the value of an undeveloped land in a developed area is to be assessed on a comparison with the value of the latter, the process of estimating should necessarily involve deduction of the cost of factors required to bring the undeveloped lands on a par with the developed lands. We consider, therefore, that the Court helow was right in making allowance for the space for roads and also for the cost of laying roads and of other amenities. Counsel for the appellants, however, invited our attention to *Mohammad Karimuddin* v. *The Collector of Madras*[4] to which one of us was party. But it may be seen that compensation in that case too was given at a higher rate per ground for lands abutting the road and at a lower rate for lands lying to the rear. Further, this Court in that case was valuing a bungalow with a large extent of land around it forming one unit, the whole of which was compulsorily acquired. In this case, the land acquired is a vacant site without any building, part of the land abutting a main road.

The next question is whether the Court below is right in deducting 20 per cent of the tope area as for space required for roads. Counsel for the appellants has not shown any basis on which we can differ from the Court below on this aspect. Having regard to the total extent of 79 grounds under acquisition, it seems to us that the extent of space which is one-fifth of the total area may reasonably be required for roads. As to the cost of laying them, it is contended that Rs. 800 per ground is excessive.

There is perhaps some force in this contention, though there are no clear data before us. In *Madras State* v. *Balaji Chettiar*[1] a case of acquisition in 1948, the cost of making roads was fixed at Rs. 450 per ground, and in *State of Madras* v. *Sri Raja Rao Venkata Kumara Mahipathi Surya Rao Bahadur Varu*[2] where the acquisition was in 1957, at Rs. 600 per ground. In this case, the acquisition was in 1958, and we are of the view that Rs. 600 may be a fair rate.

1. (1958) 2 M.L.J. 330 : A.I.R. 1959 Mad. 16.
2. A.S. No. 96 of 1961.
3. A.I.R. 1960 Bom. 448.
4. (1965) 1 M.L.J. 66 : I.L.R. (1964) 2 Mad. 337.

Council for the appellants relied on Exhibit C-2, dated 2nd November, 1956, which conveyed for Rs. 1,225 at the rate of Rs. 3,500 per ground an extent of 840 sq. ft. forming part of the land now under acquisition, and pressed that we should adopt this rate for the rear lands. We think that this is a just claim. We are aware that the price paid for a small plot of land cannot normally be the sole basis for determining the market value of a larger extent. Even so, as the land covered by Exhibit C-2 abuts a lane and since 1955 prices must have gone up in the locality, by 1958, we think Rs. 3,500 per ground is reasonable.

In modification of the decree of the Court below, the appellants will be paid compensation only so far as they are concerned at the rate of Rs. 5,000 per ground for their half share in an extent of 4 grounds and 1,900 sq. ft. which abuts the main road, and at the rate of Rs. 3,500 per ground for their share in the remaining extent of land, after deducting 20 per cent of the total area as for making roads and Rs. 600 per ground with reference to their half share in the 80 per cent of the land towards the cost of laying roads and other amenities. The solatium granted to them by the Court below will stand but will be worked out on the basis of our decree. The appellants will be entitled to interest from the date allowed by the Court below.

The appeal is allowed in part but with no costs. As regards the non-appealing claimant or claimants, the decree of the Court below will stand.

R.M. ——— *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE P. KUNHAMED KUTTI.

M. Bhoopathy (died) and others .. *Appellants**

v.

M.S. Vijayalakshmi and another .. *Respondents.*

Motor Vehicles Act (IV of 1939), section 96—Insurance of motor vehicle—Transfer of vehicle—Effect on policy—Accident after transfer—Liability for damages to third party.

There is nothing in section 96 of the Motor Vehicles Act which warrants the view that a sale or transfer of an insured car by the insured during the currency of the policy does not terminate the policy. In the absence of a stipulation to the contrary in the policy the moment the insured parts with his car, the policy relating to it lapses because the car is the subject-matter or the foundation of the contract of insurance. The insurer is not liable to the transferee for damages awarded to a third party for injuries caused by rash and negligent driving of the car on a date subsequent to the transfer of ownership.

Madras Motor Insurance Co., Ltd. v. *Mohamed Mustafa Badsha*, (1960) 2 M.L.J. 202, overruled.

Appeal against the decree of the City Civil Court (II Assistant Judge), Madras in Original Suit No. 2514 of 1959.

R. Rangachari, Advocate, for Appellants 2 to 4.

T. Aravamuda Iyengar, Advocate, for 1st Respondent.

S. Govind Swaminathan, for *Habibullah Badsha, E. S. Govindan* and *G. A. Khan*, Advocate, for 2nd Respondent.

When the appeal came on for hearing before him the following order was made by

Ramakrishnan, J.†:—The appeal is filed *in forma pauperis* by the plaintiff from the Judgment and decree of the learned Second Assistant Judge, City Civil Court, Madras in O.S. No. 2514 of 1959, which was also a suit filed *in forma pauperis*. The memorandum of cross appeal is filed by the third defendant in the suit Messrs. Hercules Insurance Company.

A Vauxall car bearing No. MYA 4446 driven by a driver by name Ramaswami collided near the Walajah Gate of Fort St. George at about 11-30 A.M. on 4th December, 1958, with a bycycle ridden by the plaintiff. The plaintiff was employed at that time as a hammering attender in the binding department of the Accountant-

* A. No. 448 of 1962 and Memorandum of Objections. 9th April, 1965.
† 30th July, 1964.

General's Office, Madras, a Class IV servant getting a salary of Rs. 97 pre mensem. As a result of the accident he sustained a fracture of the wrist and his capacity to do his duty was seriously impaired. It was the case of the plaintiff that the accident which caused him this injury was due to the negligence of the driver, the aforesaid Ramaswami, of the car. The driver was prosecuted under section 338 and section 116 of the Motor Vehicles Act in a Criminal case before the Chief Presidency Magistrate, where he pleaded guilty to the charge of rash and negligent driving and was find as a result. The registration of the aforesaid car stood in the name of the second defenant till 29th August, 1958, when the 'C' Certificate relating to the car appears to have been transferred to the first defendant, the daughter of the second defendant. The car had been insured against the third party risk with the third defendant, Messrs. Hercules Insurance Company. Alleging that the damages sustained by the plaintiff could be estimated at Rs. 6,000 the plaintiff claimed this amount from the three defendants. The second defendant died in the course of the suit and the first defendant was also recorded as his legal representative by the order of the Court.

The first defendant's plea was briefly this. It was untrue to say that the plaintiff became incapacitated for work because of the injury. In any event the amount of Rs. 6,000 claimed as damages was excessive. The second defendant, who was the owner of the car, had transferred it to the first defendant on 11th August, 1958, and the 'C' Certificate was transferred to her name on 29th August, 1958. The second defendant had insured the car with the third defendant and the insurance extended up to 12th September, 1958, covering third party risk. The first defendant paid the premium for the issue of a policy in her name covering third party risk from 31st August, 1958 to 30th September, 1959. While she was expecting the issue of a policy in the usual course, the present accident happened on 4th December, 1958. When the first defendant's representative called at the third defendant's office, at Bangalore for the issue of a policy, she learnt that the policy had been wrongly issued in the name of the second defendant for the period 31st August, 1958 to 30th September, 1959. The third defendant's office at Bangalore suggested that if a transfer of the said policy was effected, the matter could be regularised and that they would meet the claim of the plaintiff. The third defendant also instructed the first defendant not to reply to the letter of the plaintiff under any circumstances so that the third defendant might defend an action by the plaintiff. Because of this, the first defendant did not reply or take any proceeding. Thereafter the third defendant transferred the policy issued in the name of the second defendant to the first defendant. In February 1959 she sold the car to a third party.

The plea of the Insurance Company, the third defendant, was this. The plaintiff is put to strict proof of the injury and the quantum of damages claimed by him. The policy of insurance for the said car was issued only in the name of the second defendant. Only on 9th July, 1959, did the third defendant come to know from the Regional Transport Officer, Bangalore, that the registration of the car was transferred to the first defendant on 29th August, 1958. Only on 5th December, 1958, was the third defendant intimated about the transfer of the said car with a request to issue cover of insurance in the name of the first defendant. Thereupon the third defendant transferred and issued a fresh cover of insurance for the said car in favour of the first defendant effective only from 5th December, 1958. Since there was no effective policy of insurance as on the date of the accident, 4th December, 1958, no claim could be made against this defendant in respect of the alleged accident on 4th December, 1958.

The learned Second Assistant Judge of the City Civil Court found that the accident was caused by the rash and negligent driving of the driver of the car MYA 4446, that the driver was employed at that time for his master's purpose and that the owner of the car on the date of the accident, the first defendant, was liable to pay damages to the plaintiff. Secondly as regards the quantum of damages the finding of the learned Assistant Judge was that the plaintiff did not sustain a permanent disability or an injury of a permanent character. The first sentence in paragraph 13 of the printed judgment of the lower Court, which gives a contrary import, appears

to have been due to a printer's devil. The lower Court found that even though the plaintiff did not sustain a permanent disability or an injury of a permanent character, damages had to be awarded to him for the pain and suffering undergone by him as a result of the accident, in view of the fact that he had developed wrist drop and radial nerve paralysis for some time, while he was undergoing treatment, as an inpatient for 4 days at the General Hospital, and an outpatient for more than one month at the Royapettah Government Hospital. He had also to take leave for six months following the accident. The lower Court took the surrounding circumstances into consideration and referred to the fact that in such cases the assessment of compensation should necessarily be a matter to some extent of conjecture, and decided that the quantum of damages should be Rs. 1,000. Thirdly, the lower Court found that even though on the date of the accident, the policy of insurance stood in the name of the second defendant, and even though the registration of the car had been transferred prior to that date to the first defendant, the insurance company was liable to meet the claim of the plaintiff. For this conclusion the lower Court relied upon section 96 of the Motor Vehicles Act as interpreted by a decision of Anantanarayanan, J., in *Madras Motor Insurance Co., Ltd., Madras* v. *Mohamed Mustafa Badsha and others*. In the result, the plaintiff was given a decree for Rs. 1,000 for damages as against defendants 1 and 3. Parties were directed to pay and receive proportionate costs. The plaintiff was directed to pay the Court-fee due to the Government on the pauper suit.

The plaintiff has appealed from the decree of the lower Court. He died in the course of this appeal and his legal representative was brought on record. The appellant urged that the quantum of damages awarded to him was inadequate. He contended further that the lower Court ought to have awarded proportionate costs to the defendants as against the plaintiff as in similar circumstances a plaintiff cannot be expected to evaluate quantum precisely and that if the Court were to fix the quantum later on at a lower figure, it would not be proper in such a case to award proportionate costs against the plaintiff. It was also urged by the learned Counsel that the direction for the plaintiff to pay the Court-fee due to Government will practically exhaust the relief of damages awarded to him and he will get no tangible benefit from the decree. The liability placed on the plaintiff to pay the Court-fee due to Government is therefore attacked as improper.

The cross-objector the 3rd defendant urged that as there was no effective and valid Insurance Policy on 4th December, 1958, the date of the accident, the Insurance Company should not be made liable for the quantum of damages. The previous insurance policy had lapsed by efflux of time on 12th September, 1958, and there was no insurable interest with the assured, between 12th September, 1955 and 4th December, 1958, when the accident took place. The Policy issued to the 1st defendant on 5th December, 1958, was void on the ground that it was obtained by the non-disclosure of a material fact, *viz*., the accident in which the car was involved on 4th December, 1958. It was also urged that the lower Court was wrong in finding the driver negligent on the basis of the Judgment of the criminal Court.

The points for determination in the appeal and the cross appeal are :—

1. Was the accident caused due to the negligence of the driver Ramaswami of the car ?

2. What is the proper amount for the quantum of damages ?

3. What is the proper order to be passed in the matter of costs and Court-fee on the pauper suit ; and

4. Is the 3rd defendant Insurance Company liable to pay damages awarded by the Court ?

Since under Point No. 4 above, I have proposed to refer the case for decision by a Bench of this Court, it is unnecessary for me to give a finding under Points 1 to

1. (1960) 2 M.L.J. 202.

3. However the arguments urged by the Counsel on both sides on the several points are :

Point No. 1 : It was contended by the cross-objector that the lower Court relied exclusively on the Judgment of the criminal Court finding the driver negligent whereas it should have come to the conclusion on the evidence in the case. A reference to para. 9 of the Judgment of the lower Court shows no doubt that the Court had in view the Judgment of the Chief Presidency Magistrate. But it also took into account the fact that the driver of the car had admitted during the hearing of the Criminal case that he had acted rashly and negligently in driving the car. Apart from this in the present case, there was the evidence of the plaintiff himself regarding the circumstances in which the accident happened. He was keeping to the left side of the road near the Wallajah Bridge and it was then that the car MYA 4446 came on the opposite direction and knocked him down. It was therefore urged that there was thus ample material for the Court to give a finding about the negligence of the driver apart from the proceedings in the Criminal case. As already mentioned there is no dispute in this case regarding the vicarious liability of the owner of the car for the driver's negligence.

Point No. 2 : I have carefully gone through the evidence in this case both of the plaintiff as well as of D.W. 2, the Assistant Surgeon who treated the plaintiff. The plaintiff was attending to hammering as an attender in the Accountant-General's Office. After the accident for some time he could not use his hand. He had to take leave for six months. Thereafter he has been employed in the Accountant-General's Office on the same salary but in a different job where hammering is not involved. According to the Doctor the fracture had become united when he saw the plaintiff soon after he was discharged from the General Hospital that the plaintiff might be able to take meals, with his right hand that the plaintiff could lift small weights with his right hand and he could write, that to a limited extent he could attend to the normal work and that after treatment the plaintiff was relieved of his disability to some extent. While he was undergoing treatment he had developed wrist drop and radial nerve paralysis. But these conditions have subsequently disappeared, thanks to the treatment. It was in such circumstances the lower Court came to the conclusion that as a result of the injury the plaintiff had not lost his earning capacity and that what was to be compensated in substance in this case was for the suffering and pain undergone by him as a result of the accident. There might be some impairment of the efficiency of his right hand. No doubt he could not wield a hammer as he was doing before the accident, with his right hand. As already mentioned that has not at all affected his job. His superiors have put him to some other branch of work where so much physical strain is not involved. It is in such circumstances the lower Court fixed the quantum of damages at Rs. 1,000 no doubt on an arbitrary basis. But the plaintiff as a Government servant was treated in the hospital without any extra charges and there was only the question of his suffering, pain and mental anxiety during the period of his treatment. Even though he did remain as an in-patient in the Hospital for 4 days, for the rest of the time he was having his treatment as an out-patient. He was on leave for six months. There is no evidence to show that he suffered from any loss in the emoluments during that period.

Point No. 3 : The appellant's learned Counsel urged that in the very nature of the case where the quantum of damages has to remain uncertain till a fair estimate is given by an impartial authority, the plaintiff could not estimate the correct figure in the plaint. He can only assert the circumstances leading to the liability of the defendants for the damages and give an approximate amount for the quantum. In a decision of the Allahabad High Court reported in *Rahim Bakhsh* v. *Bachcha Lal*[1] which is a suit for damages for defamation the Court at page 518 observed :

"We do not think that the Court below has exercised a sound discretion in allowing the plaintiff costs proportionate to the claim allowed by it. The plaintiff's cause of action was well-founded. The defendant was clearly a wrong doer. We think that in a case where it was extremely difficult for the plaintiff to value his claim at a particular figure, he was justified in assessing his claim at Rs. 5,100. We are of opinion that the plaintiff is entitled to his costs .... "

1. (1928) I.L.R. 51 All. 509 at 518.

It was urged by the appellant's learned Counsel that the above reasoning could be adopted to this case and the decree of the lower Court should be modified by directing the plaintiff to recover his full costs from the defendants besides and that the defendants should be made liable to pay the Court-fees payable on the plaint.

Point No. 4 : Sri Govind Swaminathan appearing for the cross-objector, the 3rd defendant Insurance Company referred to section 96 (2) of the Motor Vehicles Act which sets out a list of grounds which will be open to an Insurer to urge in defence to an action by the Insured for damages in accordance with the terms of the Insurance Policy. It is not necessary to recapitulate clauses (*a*), (*b*) and (*c*) of section 96 (2) because the contention of Sri Govind Swaminathan for the cross-objector is that the grounds set out in section 96 (2) (*a*), (*b*) and (*c*) are grounds which will apply when there is a valid policy of insurance ; but where the Insurer has parted with the car (which is the subject-matter of the Insurance) at the time of the accident to a third party the policy effected with the former owner will no longer hold good in respect of an accident subsequent to the transfer ; it is necessary for covering the liability arising out of such an accident by a fresh insurance in favour of the transferee or some other appropriate agreement by which the Insurer is made aware of the transfer and holds himself liable for damages arising out of an accident after the car has come into the ownership of the transferee. In other words, the Insurance Company should have agreed to treat the transferee as the insured after the transfer at the time of the accident. Learned Counsel referred to section 10 (1) of the English Road Traffic Act, 1934, which contains provisions analogous to those in section 96 of the Indian Act—Motor Vehicles Act, 1939 and corresponding English decisions under section 10 (1) of that Act. Section 10 (1) of the English Road Traffic Act reads thus :

> "*Duty of Insurers to satisfy Judgments against persons insured in respect of third party risks*: If after a certificate of insurance has been delivered under sub-section (5) of section 36 of the Principal Act to the person by whom a Policy has been effected, Judgment in respect of any such liability as is required to be covered by a policy under para. (*b*) of sub-section (1) of section 36 of the Principal Act (being a liability covered by the terms of the Policy) is obtained against any person insured by the Policy, then notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the Policy, the Insurer shall subject to the provisions of the section pay to the persons entitled to the benefit of the Judgment any sum that may be payable thereunder in respect of the liability including any amount payable in respect of costs and any sum payable in respect of interest on that due by virtue of any enactment relating to interest on Judgments."

Whereas in section 10 (1) of the English Act the words used are "notwithstanding that the Insurer may be entitled to avoid or cancel or may have avoided or cancelled the Policy" in section 96 (2) of the Indian Act (Motor Vehicles Act) the clause used is

> "an insurer to whom notice of the bringing of any such proceedings is so given shall be entitled to be made a party thereto and to defend the action on any of the following grounds".

Commenting on the use of the words 'entitled to' in this context Shawcross on the Law of Motor Insurance, Second Edition at page 287 observes :

> "The words 'is entitled to' are vital. They show that the section has no application to a Policy which has been automatically avoided, as when the assured dies, becomes bankrupt, or parts with the insured vehicle."

Sri Govind Swaminathan relies on this observation and argues that where the insurer has parted with the insured vehicle and the Insurance Co. has entered into no fresh arrangement with the transferee recognising his transfer and holding itself bound to him for the accident subsequent to the date of the transfer, it would be a case of the liability of the insurer under the policy becoming automatically avoided. One may refer to section 102 of the Motor Vehicles Act which preserves the insurer's liability after the death of the insured, and preserves the survival of the cause of action arising out of the said event, against his estate or against the insurer. Cases of bankruptcy of the insured are provided for in the Motor Vehicles Act in section 97 but cases of transfer are not similarly provided. Until and unless the Insurance Company enters into a fresh arrangement with the transferee, it is pointed by the learned Counsel for the cross-objector, the liability cannot continue after the transfer.

Learned Counsel also referred to the decisions which have interpreted the corresponding provisions of the English Road Traffic Act, 1930 and later on of 1934. He cited *Peters* v. *General Accident and Life Assurance Corporation Ltd.*[1]. A Motor Van said to have been insured with the General Accident and Life Assurance Corporation knocked down one Peters at a time when one Pope was driving it. Peters recovered Judgment against Pope for damages and claimed also a right to recover damages from the Insurance Company in accordance with the terms of the Policy. But the car originally was the property of one Coomber who had insured it with the Company; Coomber had sold the car to Pope, who drove the car at the time of the accident. The Insurance Policy was handed over by Coomber to Pope together with an application form for a new Policy and the Registration Book but nothing was done by Pope to contact the Insurance Company and make it aware of the transfer. In such circumstances, Goddard, J. following his earlier decision *Tattersall* v. *Drysdale*[2], observed at page 633.

"I am dealing with burglary, fire accident and so forth. I do not think you can assign the Policy so as to make of what is a contract of personal indemnity to *A*, a contract of personal indemnity to *B*. You cannot thrust a new assured upon a Company against its will. If you do that, you must have novation. You must have the release of the assured and the acceptance of a new assured .... Sorry as I am for Mr. Peters, he is thus left with an award of damages and costs amounting to some £500 and only somebody who has not 500 S. to proceed against. In this case I cannot say that the person who injured him was insured. The fact was that he was driving an uninsured car."

As revealed by the above forcible expression of his view by Goddard, J. in such circumstance *i.e.*, after the transfer of the car and without there being any privity of contract between the Transferee and the Insurer, there could not be any more a valid Insurance Policy in existence in respect of the car to cover accidents subsequent to the transfer. In the present case, after the transfer of the car and the transfer of the Registration Certificate thereafter on 29th August, 1958, from the 2nd defendant to the 1st defendant there was no valid Policy which would cover the accident on 4th December, 1958. The Insurance Co. contended that the intimation regarding the transfer was received by it from the 1st defendant only on 5th December, 1958 and that without mentioning the accident on 4th December, 1958. There was a contention by the 1st defendant that she paid the premium on 31st August, 1958, for the issue of a Policy in her favour covering third party risks from 31st August, 1958 to 30th September, 1959, but there is no satisfactory evidence in proof of that fact. She has not gone into the witness box to speak to it. We have only Exhibit B-19 a certificate of renewal of insurance dated 30th October, 1958, in favour of the 2nd defendant and the letter of the 1st defendant to the Insurance Company is Exhibit B-20 dated 5th December, 1958. We have an Insurance cover note of some other date Exhibit B-15 in favour of the 1st defendant. The lower Court has not found on the evidence that the 3rd defendant had in fact been made aware of the transfer to the 1st defendant prior to 5th December, 1958. It proceeded to determine the 3rd defendant's liability on the basis of the decision of Anantanarayanan, J., in *Madras Motor Insurance Co., Ltd., Madras* v. *Mohammed Mustafa Badsha and others*[3] where the learned Judge observed :

"In view of the specific provision in section 96 of the Motor Vehicles Act it cannot be contended that a policy of Insurance lapses the moment the insured parts with the ownership of the vehicle. Even if the insurer has any ground which would entitle him to avoid the Policy as against the insured, the insurer cannot escape the liability to pay the victim of an accident so long as the policy is current and valid. Sale of the vehicle is not a ground under the section to avoid a Policy of Insurance. Hence where the owner of a vehicle which is insured under the Act against the 3rd Party risks sells the same to another but transfer of ownership or transfer of the Policy has not yet taken place, and an accident occurs the Insurance Co. cannot escape its liability under the Policy."

Learned Counsel Sri Govind Swaminathan appearing for the cross-objector contended that this statement of the law by the learned Judge, is opposed to the decisions both in England as well as of other High Courts in India besides the observation of Shawcross above referred to. In *Gyarsilal* v. *Sitacharan*[4] a Bench of Madhya Pradesh High Court has specifically dissented from the view expressed in the

1. (1937) 4 All E.R. 628.
2. L.R. (1935) 2 K.B. 174.
3. (1960) 2 M.L.J. 202.
4. A.I.R. 1963 M.P. 164.

above Madras case. In *Des Raj* v. *Concord of India Insurance Co.*[1] it has been observed that a Motor Insurance Policy does not remain in force if there is a change of ownership of the car insured unless there is an agreement between the company and the new owner that the Policy shall remain in force. Anantanarayanan, J., in *The Madras Motor Insurance Co., Ltd., Madras* v. *Mohamed Mustafa Badsha and others*[2] referred to the decision of Goddard J., in *Peters* v. *General Accident and Life Assurance Corporation Ltd.*,[3] and observed that there was no term in the Policy before the learned Judge for the purpose of lapsing in the event of transfer of that property. But it is pointed by Govind Swaminathan that the decision of Goddard, J., did not proceed on the basis of such a clause in the Policy but it proceeded on general principles that the contract between the insurer and the insured including liability for third party risk will not subsist when the insurer parts with the car to a third party. The original Policy of Insurance in this case has not been produced. But Sri Govind Swaminathan showed me a sample of the Policy which according to him has been uniformly used by the Company. There is no clause there about the Policy lapsing in the event of a transfer. But as mentioned already it is not necessary to have a clause in the Policy for its lapsing in the event of a transfer. It cannot subsist when the insured car itself is transferred unless either by agreement or by a special provision in the Statute (as in the case of death or bankruptcy) the liability can be enforced even after the transfer.

Learned Counsel for the cross-objector has submitted that in view of the importance of this question which is likely to occur very frequently and in which the Insurance Companies as well as the public are greatly interested, it will be necessary to get a decision on this matter by a Bench of this Court, especially in view of the conflict between the decision of this Court given by Anantanarayanan, J., above cited, and of other Courts in India. After carefully considering this question I am of opinion that there is scope for taking a different view from that of Anantanarayanan, J., and that as the matter is of considerable public importance, it will be appropriate for being considered by a Bench of this Court. The case will be placed before my Lord the Chief Justice accordingly.

In pursuance of the order of reference the appeal and memorandum of cross-objections came on for hearing before a Bench (*Veeraswami* and *Kunhamed Kutti, JJ.*)

R. Rangachari, Advocate, for Appellants 2 to 4.

T. Aravamuda Iyengar, Advocate, for 1st Respondent.

S. Govind Swaminathan, for *Habibullah Badsha*, *E. S. Govindan* and *G. A. Khan* Advocates, for 2nd Respondent.

The Judgment of the Court was delivered by

*Veeraswami, J.**—The appeal and the Memorandum of cross-objections raise a question of importance as to accident liability to third party under Motor Insurance and come before us on a reference by Ramakrishnan, J. The precise point for our decision is whether the Insurer of a Motor car is not liable to a third party on a comprehensive policy of insurance on account of an accident to him by the negligence of the assured's driver because the accident took place after the assured as the owner of the car had sold it to another and before the purchaser got an extension of the cover to him or obtained a fresh policy. The Court below followed as it was bound to, *Madras Motor Insurance Co., Ltd.* v. *Mustafa Badsha*[2] and held against the insurer. Anantanarayanan, J., was there of the view that a policy of insurance did not lapse the moment the Insured parted with the ownership of the insured vehicle and that notwithstanding such transfer of ownership the insurer having regard to the terms of section 96 of the Motor Vehicles Act could not escape his liability on the Policy in respect of third party risks. The lower Court decreed the suit against defendants 1 and 3 for Rs. 1,000. The plaintiff has preferred an appeal dissatisfied with the quantum awarded by the Court below and the 3rd defendant has preferred cross-objections canvassing the correctness of the view of Anantanarayanan, J.

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1. A.I.R. 1951 Punj. 114.
2. (1960) 2 M.L.J. 202.
3. (1937) 4 All E.R. 628.

* 5th April, 1965.

The facts of this case are not now in dispute. A Vauxhall Saloon with registration mark MYA. 4446 owned by one Venkataswamiappa the 2nd defendant was insured in his name with the Hercules Insurance Co., Ltd., at its Branch Office at Madras under a comprehensive policy covering third party risks. During the currency of the policy the 2nd defendant sold his car to his daughter the 1st defendant on 11th August, 1958 and the transfer of ownership to her was effected by the Regional Transport Officer at Bangalore on 29th August, 1958. But the Insurance Company, the 3rd defendant had no knowledge of this transfer until 5th December, 1958. On that date the 1st defendant applied for and obtained on the same date a fresh Policy of Insurance from the 3rd defendant in her name. This Policy clearly mentioned its effective date of commencement to be 5th December, 1958. In the meantime on 4th December, 1958 the car knocked down the plaintiff from his cycle as he was riding from the Fort along the Munroe Statue Road at Madras, resulting in fracture of his right forearm. The man who was driving the car at the time was prosecuted for criminal negligence and was convicted. The plaintiff in the circumstances brought the suit claiming Rs. 6,000 against defendant as damages. He impleaded the 3rd defendant the insurer as liable to him under the third party cover. The Court below found the negligence of the driver and fixing the damages at Rs. 1,000 decreed the suit against the defendants 1 and 3, the 2nd defendant having died *pendente lite*. In doing so, the Court below relying on *Madras Motor Insurance Co., Ltd.* v. *Mohammed Mustafa Badsha*[1] rejected the 3rd defendant's contention that the policy had terminated with the sale of the car in August, 1958, and that it was not in force on the date of the accident to make him liable to the suit claim. Before proceeding further to conclude the facts we must mention that when the 1st defendant applied for and got a fresh policy on 5th December, 1958 she did not apprise the Company of the accident that had occurred the previous day.

The Policy of Insurance issued to the 2nd defendant is in the usual form and has been issued in the name of the 2nd defendant in respect of his car specified in it with details as to its name, cubic capacity, year of manufacture, value, type of body, seating capacity and as to whether it was new or second hand and provides for comprehensive cover including third party risks. The proposer among other queries was asked whether he was the sole owner of the car and whether it was registered in his name and the 2nd defendant had provided the answers in the affirmative. The proposal and declaration under the stipulation in the Policy were to form the basis of the contract and deemed to be incorporated therein. The indemnity under the policy related to a loss or damage of the insured car and in the event of accident caused by or arising out of the use of the car to the liability for all sums including claimant's costs and expenses which the Insured was obliged to pay in relation to the death of or bodily injury to any person. Certain general exceptions to the liability under the Policy and conditions some of which were intended to comply with the provisions of the Motor Vehicles Act were also incorporated as terms of the policy. It may be seen that the policy issued to the 2nd defendant was thus in compliance with section 93 (1) (*b*) of the Motor Vehicles Act and it is not in dispute that as required by sub-section (4) of that section, a certificate of insurance had also been issued to the 2nd defendant in whose favour the insurance had been effected. If the policy was in force on the date of the accident, there could be no question of the 3rd defendant's liability on the third party risk. There is no term in the contract of insurance in this case providing for continuance of the policy on transfer of ownership of the car by the assured during the currency of the policy.

Chapter VIII of the Motor Vehicles Act concerns insurance of motor vehicles against third party risks. One of its provisions makes motor insurance against third party risks compulsory for use of a motor vehicle in a public place and section 95 (1) (*b*) indicates the kind of risk such a policy should cover in respect of particular classes of vehicles and in the case of the 2nd defendant's car, the policy should insure him to the extent specified in the section against any liability which may be

1. (1960) 2 M.L.J. 202.

incurred by him in respect of death or bodily injury to any person caused by or arising out of the use of the vehicle in a public place. The other provisions in Chapter VIII make it abundantly clear that the policy should be expressed in terms that it insures the person specified in it and in respect of the vehicle to which it relates. Even apart from the statutory provisions a contract of insurance is between the insurer and the insured and its subject-matter is the car specified in it and it is the risk arising out of its use that the insurer undertakes to compensate against. Where such a contract provides for indemnity to the assured against third party risks, the third party who is a stranger to the contract cannot enforce it himself against the insurer. Neither the general principles of law relating to contracts nor the common law give a third party a cause of action against the insurer. If a third party risk arises under the policy it is entirely a matter between the insurer and the insured governed by the terms of the policy. But section 96 (1) of the Motor Vehicles Act casts a duty on the insurers to satisfy judgments against persons insured in respect of third party risk. After a judgment is obtained by a third party against the insured, the insurer is charged with the obligation to satisfy it to the extent of the cover under the terms of the Policy as if the insurer were a judgment-debtor in respect of the liability. This is a kind of subrogation not of course in the strict legal sense of the term brought about by operation of the statutory provision by which the 3rd party who has obtained a judgment against the insured gets into his shoes, as it were to work out his right of indemnity against the insurer, by placing on the insurer a corresponding liability to satisfy the judgment to the extent covered by his underwriting. For this purpose the insurer though in point of fact he is not so should be deemed to be a judgment-debtor. The conditions mentioned in sub-section (2) of section 96 should be fulfilled as one of the objects of which is to enable the insurer to ask for being made a party so that he may defend the action by the third party against the insured. This sub-section also enumerates the grounds on which the insurer may defend himself. The section further provides that no insurer who has had notice under section 95 (2) is entitled to avoid his liability to third party otherwise than in the manner provided for in sub-section (2).

Anantanarayanan, J., in *Madras Motor Insurance Co., Ltd.* v. *Mohamed Mustafa Badsha*[1] held the view that whether or not there was a term in the policy touching the matter, the sale by the insured of his car during the currency of the policy did not or would not in law operate to put an end to the Policy and enable the insurer to avoid his liability against third party risks. The Head Note which accurately summarises his view reads :

> "In view of the specific provision in section 96 of the Motor Vehicles Act it cannot be contended that a Policy of Insurance lapses the moment the insured parts with the ownership of the vehicle. Even if the insurer has any ground which would entitle him to avoid the policy as against the insured, the insurer cannot escape the liability to pay the victim of an accident so long as the policy is current and valid. Sale of the vehicle is not a ground under the section to avoid a policy of insurance. Hence where the owner of a vehicle which is insured under the Act against the 3rd party risks sells the same to another but transfer of ownership or transfer of the Policy has not yet taken place and an accident occurs the insurance Company, cannot escape its liability under the Policy."

Actually the finding in that case appears to be that there was no transfer of the car during the currency of the policy and on the date the accident took place and the observations of the learned Judge would therefore be obiter. In any event with respect, we are unable to share the view of the learned Judge. In our opinion, there is nothing in section 96 of the Motor Vehicles Act which warrants the view that a sale or transfer of an insured car by the insured during the currency of the policy does not terminate the policy. Outside the statutory provision when the motor car specified in the policy is the very subject-matter of the insurance, with its disappearance on the insured parting with it by sale or transfer of ownership the policy must necessarily lapse. After the insured has parted with his car, he has no longer any insurable interest to which the policy in his favour can relate and continue to have force. The basis of the contract of Insurance is not merely the person in whose favour an Insurance is effected but also the specified car to which the indemnity

1. (1960) 2 M.L.J. 202.

relates as will be clear from the details required of the car which are set out in the schedule to the policy. It is with reference to those details and the history of the vehicle and its owner including claims or no claims the premiums payable on the insurance is determined and the contract is formed. It follows therefore that in the absence of an express stipulation to the contrary in the policy the moment the insured parts with his car, the policy relating to it lapses because as we said the car is the subject-matter or the very foundation of the contract of insurance. Anantanarayanan, J., was evidently influenced by the words of section 96 (1), namely,

"..........notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy, the insurers shall subject to the provisions of this section pay to the person entitled to the benefit of the decree any sum not exceeding the sum assured payable thereunder as if he were the judgment-debtor....."

and by the conditions specified by section 96 (2). We are clearly of opinion that neither the words above quoted from section 96 (1) nor the conditions specified in sub-section (2) of section 96 bring about the result that a Policy of Motor Insurance will continue to operate and not lapse notwithstanding the fact that the insured during the currency of the policy has parted with the ownership of the car to which the insurance relates. On the other hand section 96 (1) itself presupposes and proceeds on the basis that there is a subsisting policy and the words in section 96 (1) "being a liability covered by the terms of the Policy" are particularly noteworthy. It is true that where an insurer has been given notice of an action the grounds of his defence in the action are limited to those specified by sub-section (2) of section 96 and it is not open to an insurer to avoid liability under a policy on any other ground. But the continued ownership of the car with the insured is basic to the subsistence of the policy and once the subject-matter of the policy is gone, so when parted with by the insured, the policy automatically lapses and there is nothing for the insurer to avoid it.

Shawcross on Motor Insurance (2nd Edition) at page 287 adverting to the circumstances in which insurers are entitled to avoid the policy says that the words "is entitled to" in the English section corresponding to section 96 (1) of our Motor Vehicles Act are vital and is rightly of the view that they show that the English section has no application to a policy which has been automatically avoided as when the assured dies, becomes bankrupt or parts with the insured vehicle. In all these cases according to him, the policy comes to an end willy nilly and cannot be revived. Section 102 of the Motor Vehicles Act states the effect of death of the insured in relation to motor insurance. If death occurs after the happening of an event giving rise to a claim under Chapter VIII of the Act, the cause of action survives against the estate of the insurer. If death of the insured occurs before the happening of such an event, then of course the policy *ipso facto* lapses and will be of no effect in respect of liabilities arising from accidents thereafter. The insolvency or winding up of an insured does not however appear to have a similar effect and terminate a contract of insurance on that account. But section 97 (1) provides that if such an insured incurs liabilities to third parties, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything to the contrary in any provision of law, be transferred to and vest in the third party to whom the liability was so incurred. *Rogerson* v. *Scottish Automobile and Gen. Insurance Co., Ltd.*[1] is a clear and direct authority that if the insured parts with ownership of insured car, the policy of insurance relating to it at once lapses. Lord Buckmaster in the House of Lords expressed his view:

"To me this policy depends upon the hypothesis that there is in fact an insured. When once the car which is the subject of this policy is sold, the owners' rights in respect of it cease and the policy so far as the car is concerned is at an end."

The argument in that case partly turned on the language "instead of" in the policy in the context of the claimant there using a new car instead of an old one. But the decision of the House of Lords was rested on the broader view we have just extracted. This decision as we understand seems to have ever since been applied and followed by the English Courts. In *Tattersall* v. *Drysdale*[2], a clause in the policy extended

1. 48 T.L.R. 17 at 18.
2. (1935) All E.R. (Reprint) 112.

the cover against third party risks to the temporary user by the insured of another car and during the continuance of the policy the insured sold the car covered by the policy the subject-matter of the insurance. The accident having occurred while the insured used another car he made a claim. Goddard, J., held:

"The policy insured the plaintiff in respect of the ownership and user of specified car and when he divested himself of his interest in that car the extension clause ceased to have effect."

The learned Judge pointed out that the decisive factor in the decision of the House of Lords we have referred to was that the subject-matter of the insurance was the specified car and that as the assured had parted with it, he no longer was interested in the policy. The learned Judge went on to observe:

"The true view in my judgment is that the policy insures the assured in respect of the ownership and user of a particular car, the premium being calculated as was found in *Rogerson's case*[1], partly on value and partly on horse power....To construe this policy otherwise would be to hold in effect that two distinct insurances were granted one in respect of the scheduled car, and another wholly irrespective of the ownership of any car."

The same question again came before Goddard, J., in *Peters* v. *General Accident and Life Assurance Corporation, Ltd.*[2] and he after reviewing the earlier cases reiterated:

"I am bound to hold that when Mr. Coomber parted with his car, his insurance qua that car lapsed and that there was no insurance."

The interesting facts in that case are that after the insured had sold his car and handed over the Insurance Policy with the vehicle to the purchaser there was an accident with reference to which the plaintiff there obtained a judgment against the purchaser and later in an action sought to recover damages he had been awarded from the insurers of the vendor under the provisions of the Road Traffic Act, 1934. Lord Goddard dismissed the action holding that the insurance policy had automatically lapsed. In deciding these cases, the English Courts were not unaware of the provisions in the Road Traffic Acts which is *pari materia* with and analogous to section 96 (1) of the Motor Vehicles Act here. We are therefore again with respect unable to agree with Anantanarayanan, J., that the law in this country in respect of the effect of a sale of an insured car upon the policy relating to it is different. Falshaw, J., of the Punjab High Court has held in *Des Raj* v. *Concord of India Insurance Co.*[3], that a Motor Insurance Policy does not remain in force if there is a change of ownership of the car insured unless there is an agreement to the contrary in the policy. A Division Bench of the Madhya Pradesh High Court in *Gyarailal* v. *Sitacharan*[4], has dissented from the reasoning of the *Madras Motor Insurance Co., Ltd.* v. *Mohammed Mustafa Badsha*[5], based on section 96 of the Motor Vehicles Act. On facts in the Madhya Pradesh case of course it proceeded on a ground of novation as to liability of the insurer to a third party.

On principle and authority, we hold that on the date of the accident in this case there was no policy in force so as to make the 3rd defendant the insurer liable to the plaintiff. The other findings of Ramakrishnan, J., have not been questioned before us. The appeal is dismissed but the cross-objections are allowed. The suit against the 3rd defendant will stand dismissed. No costs in any of them either here or below. The 1st defendant as L.R. of the 2nd defendant will pay the court-fee due on the plaint and grounds of appeal from out of the estate of the 2nd defendant.

K.S. *Appeal dismissed; Cross objection allowed.*

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1. (1931) 146 L.T. 26.
2. (1937) 4 All E.R. 628.
3. A.I.R. 1951 Punj. 114.
4. A.I.R. 1963 M. P. 164.
5. (1960) 2 M.L.J. 202.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Ordinary Original Civil Jurisdiction.)

PRESENT :—MR. JUSTICE R. SADASIVAM.

Amalgamated Commercial Traders Private, Ltd. .. *Plaintiff**

v.

C. Hariprasad and another .. *Defendants.*

Civil Procedure Code (V of 1908), section 151 *and Order* 6, *rule* 16—*Power of Court to expunge scandalous allegations from an affidavit.*

Practice—Scandalous matter in any record or proceedings of Court—Power of Court to strike out.

Every Court has an inherent power, quite independently of the provisions of Order 6, rule 16, Civil Procedure Code to strike out scandalous matter in any record or proceedings on its file. Though Order 6, rule 16 of the Code may not in terms apply to affidavits, under section 151 of the Code the Court has inherent power to expunge scandalous allegations which are irrelevant to the proceedings, even though they are contained in an affidavit and not in the pleadings. But nothing can be scandalous which is relevant.

Application by plaintiff to expunge certain words, passages and sentences in the affidavit of the respondent filed in an application in the plaintiff's suit.

G. Vasantha Pai and *D. Padmanabha Pai*, for Plaintiff.

V. V. Raghavan, *D. R. Sivagnanam* and *G. Ramaswami*, for Defendants.

The Court made the following

ORDER.—Application by the plaintiff to expunge certain words, passages and sentences from the affidavit of the respondent filed in Application No. 1838 of 1964 in C.S. No. 65 of 1964 on the file of this Court, as being scandalous, irrelevant, unnecessary and calculated to prejudice and embarrass the trial of the suit.

Sri G. Ramaswami, appearing for the respondent, took a preliminary objection that Order 6, rule 16, Civil Procedure Code, can be invoked only in respect of pleadings and that there is no corresponding provision in respect of affidavits in Order 19, Civil Procedure Code. Order 19, rule 27 of the Rules of the Supreme Court corresponds to Order 6, rule 16, Civil Procedure Code. Order 28, rule 11, of the Rules of the Supreme Court provides that the Court or Judge may order to be struck out from any affidavit any matter which is scandalous. Sri G. Ramaswami stressed on the fact that there is no corresponding provision in the Civil Procedure Code and that even in England the said rule is confined only to 'scandalous' matters in affidavits. It is clear from Mulla's Code of Civil Procedure, 12th Edition, Volume I at page 593 that every Court has an inherent power quite independently of Order 6, rule 16, Civil Procedure Code, to strike out scandalous matter in any record or proceedings. In *Christie* v. *Christie*[1], it is stated that the Court has a duty to discharge towards the public and the suitors, in taking care that its records are kept free from irrelevant and scandalous matter. In In re, *Clive Durant*[2], the High Court of Bombay refused to allow an application for bail containing defamatory allegations against the trying Magistrate to be filed and ordered it to be returned. In *Zamindar of Tuni* v. *Bennayya*[3], the High Court of Madras ordered the objectionable passages in a memorandum of appeal alleging partiality against the Judge who decreed the suit to be expunged. Thus under section 151, Civil Procedure Code it is open to the Court to expunge scandalous allegations which are irrelevant to the proceedings, even if they are contained in an affidavit. But as pointed out in the passage in Mulla referred to above it must be noted that nothing can be scandalous which is relevant.

The applicant has referred to as many as six offending passages in the affidavit of the second defendant, in the Schedule to the application. The first four are allegations against the present Directors as puppets or tools of the Morakas. Having regard to the pleadings in this suit, I am unable to state that they are irrelevant.

* C.S. No. 65 of 1964 5th April, 1965.
(Appln. No. 2340 of 1964).

1. (1873) L.R. 8 Ch. 499.
2. (1891) I.L.R. 15 Bom. 488.
3. I.L.R. 22 Mad. 155 : 8 M.L.J. 304.

The last two offending passages mentioned in the Schedule to the application are found in the following passage in the affidavit of the second defendant:

"The Company has no staff in Madras except an attender now promoted an Assistant, Mr. Harry Kingsley. He is totally ignorant of the affairs of the company, but the company has shifted its registered office to 337, Thambu Chetty Street in a room adjacent to the Office of its Counsel Mr. G. Vasantha Pai, so that he may be enabled to get affidavits made to his dictation and executed by the said Mr. Harry Kingsley at his orders. The Madras Office is practically under the advice and supervision of Mr. Pai and its present almost sole activity is the prosecution of various proceedings against me and the other defendants in the manner aforestated."

There can be no doubt that several averments made in the above passage are scandalous, and, in my opinion, they are totally irrelevant either to the application, or to the suit. In fact, this passage and the other offending passages were not referred to or relied upon by the Advocates who argued the Applications Nos. 1838 to 1840 and 2080 of 1964, though the said applications were argued on two days. If the averments were in any way relevant, it is extremely unlikely that Sri G. Ramaswami appearing for the applicants would have failed to rely on them.

Harry Kingsley has stated in his affidavit that he has not filed any other affidavit in this suit except the present one to defend himself, and this fact is not disputed. He has been referred to as an attender now promoted as assistant. Kingsley has denied in his affidavit that he was ever an attender. It is stated in the reply affidavit of the respondent that Kingsley was drawing the pay of an attender. Even if Kingsley was drawing the pay of an attender, it would not be sufficient to characterise him as an attender. It is also unnecessary to indulge in the scandalous remark that Harry Kingsley was an attender in the application to direct the plaintiff to give security for costs. Kingsley has stated in his affidavit that he drafted the proceedings of a meeting to the dictation of the second defendant and a photo copy of the same has been filed.

The more serious allegation in the above offending passage is one against Sri G. Vasantha Pai appearing for the plaintiff in the suit. It is stated that the Company shifted the office to the premises where Sri Vasantha Pai is having his Chambers so that he may be enabled to get affidavits made to his dictation and executed by the said Harry Kingsley. There is a further allegation that the Madras Office is practically under the advice and supervision of Mr. Pai. The above allegation that Mr. Pai is supervising the Madras Office is scandalous and defamatory and there is absolutely no necessity to make that allegation in the affidavit in support of the application for directing the plaintiff to furnish security for costs. It is unfortunate that an affidavit containing such allegations has been filed.

For the foregoing reasons, the above offending passage in the affidavit of the second defendant is ordered to be expunged. The applicant is entitled to costs of this application.

R.M. ——— *Application allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. S. VENKATARAMAN.

M. K. Sundararamier .. *Petitioner**

v.

C. M. V. Krishnamachary and another .. *Respondents.*

Transfer of Property Act (IV of 1882), section 55 (6) (b)—Scope of—Charge over the property in favour of buyer who has paid an advance—If could be notified in sale proclamation under Order 21, rules 58, Civil Procedure Code (V of 1908) in execution of decree by another decree-holder.

Where a person alleges that he has paid an advance towards the purchase of a property and the seller has improperly failed to complete the sale, he is entitled to have his statutory charge over the property in dispute for the amount advanced by him, notified in the sale proclamation if the property is brought to sale in execution by another decree-holder. Section 55 (6) (b) of the Transfer of Property Act will apply to cases of executory contracts.

* C.R.P. No. 576 of 1965. 9th April, 1965.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Madurai dated 10th December, 1964 and made in E.A. No. 361 of 1964 in E.P. No. 153 of 1963 in O.S. No. 30 of 1963.

S. Kothandarama Nayanar, for Petitioner.

The Court made the following

ORDER.—This Revision Petition arises out of E.A. No. 361 of 1964 in E.P. No. 153 of 1963 in O.S. No. 30 of 1963 on the file of the Sub-Court, Madurai. The suit, O.S. No. 30 of 1963, was filed by the plaintiff Venkataraman against M. K. Sundararamier, his daughter-in-law and grandson for a certain sum of money. He exonerated the daughter-in-law and grandson and obtained a decree for Rs. 9,000 against Sundararamier. To execute the decree, he filed E.P. No. 153 of 1963 and attached a house belonging to the joint family consisting of Sundararamier, his daughter-in-law and his grandson. The house is said to be worth about Rs. 29,000. But in respect of that house, Sundararamier had executed an agreement Exhibit A-1, dated 6th September, 1962 for Rs. 29,000 in favour of one C. M. V. Krishnamachary. Under the agreement a sum of Rs. 9,000 was advanced. But the sale was not completed. It is the case of C. M. V. Krishnamachary that the default was with M. K. Sundararamier. He has issued a notice Exhibit A-2 dated 21st February, 1963 to M. K. Sundararamier but to no purpose. C. M. V. Krishnamachary alleged that not merely did Sundararamier fail to complete the sale deed but he set up his grandson to file a partition suit, O.S. No. 31 of 1963, in the Sub-Court and claim a half share and that further he set up Venkataraman to file O.S. No. 30 of 1963, and bring the properties to sale. On such allegations C. M. V. Krishnamachary filed E.A. No. 361 of 1964 under Order 21, rule 58, Civil Procedure Code claiming a charge over a sum of Rs. 9,000 under section 55 (6) of the Transfer of Property Act and requested the Executing Court to notify it in the proclamation of sale. The learned Subordinate Judge accepted the prayer of C. M. V. Krishnamachary and notified the charge to the extent of Rs. 9,000. This Revision Petition has been filed by M. K. Sundararamier against that order dated 10th December, 1964.

Section 55 (6) (*b*) of the Transfer of Property Act states that the buyer is entitled

> "unless he has improperly declined to accept delivery of the property to a charge on the property, as against the seller and all persons claiming under him to the extent of the seller's interest in the property for the amount of any purchase money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract, or to obtain a decree for the rescision."

Sri S. Kothandarama Nayanar, learned Counsel for the petitioner, urges that the above provision cannot be availed of by the buyer before the sale deed is executed and can be availed of by him only after the sale deed is executed. I am however unable to accept the contention, because if the sale deed is executed, the title would pass to the buyer and there is no point in giving a charge over the purchase money on the property which has become that of the buyer. The provision can have meaning only in a case where the title has not yet passed to the buyer in respect of the purchase money or any portion thereof paid by him. That the provisions of section 55 will apply to the case of executory contract, that is, where the sale deed has not been executed, is clear from the decisions quoted by the learned Subordinate Judge and the observations of the learned Judges therein, namely, *Adhikesavalu Naidu* v. *Gurunatha Chettiar*[1], *Kathamuthu Pillai* v. *Subramaniam Chettiar*[2], and *Krishnasami Rao* v. *Srinivasa Desikan*[3]. Hence the learned Subordinate Judge had jurisdiction to declare the charge.

In a Revision Petition it is really not necessary to consider the question whether it was proper to declare the charge. But on the facts of this case, on the materials available at this stage, it seems to me that the declaration of charge was proper. I have already pointed out that C. M. V. Krishnamachari sent notice Exhibit A-2

1. (1911) 32 M.L.J. 180 : I.L.R. 40 Mad. 338.
2. (1926) 50 M.L.J. 228 : 1926 M.W.N. 271.
3. (1936) 71 M.L.J. 850 at 853.

on 21st February, 1963 itself and Sundararamier did not send any reply thereto stating that he for his part was ready to complete the sale and that the default was on the part of C. M. V. Krishnamachary. Further the fact that the two suits O.S. No. 30 of 1963 and O.S. No. 31 of 1963 bear consecutive numbers suggests that they were filed at about the same time and thus lends some colour to the suggestion of C. M. V. Krishnamachary that the first defendant was responsible for the filing of those suits in order to defeat the rights of C. M. V. Krishnamachary. I am not therefore inclined to interfere in Revision. This of course does not prevent Sundararamier from canvassing the order of the learned Subordinate Judge in a regularly constituted suit. It is true that the sale is scheduled to come off on the 12th. But the petitioner has himself to blame for not having come to this Court earlier. The order sought to be revised was passed on 10th December, 1964. He got the copy of that order on 23rd February, 1965. But the present petition with an application for stay was filed on 5th April, 1965. However it is open to him to persuade the decree-holder in O.S. No. 30 of 1963 to agree for the adjournment of the sale and utilise the interval to repay the sum of Rs. 9,000 to C. M. V. Krishnamachary if the latter is willing to receive it and thereby get rid of the charge which has been ordered to be notified in the proclamation of sale. With these observations this petition is dismissed.

R.M. *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN.

V. Venkatarama Iyer, Executor of the Estate of Janakiammal .. *Appellant**

v.

K. Ranganathan Pillai and others .. *Respondents.*

Transfer of Property Act (IV of 1882), section 58 (c)—Sale with an agreement for reconveyance or mortgage by conditional sale—Test.

No cash was paid for the entire amount of consideration. A conscious intention to show that the relationship of debtor and creditor subsisted between the parties up to the time of the execution of the document is apparent. The property conveyed was worth much more than the consideration recited, in the deed. The consideration for the reconveyance was Rs. 500 less than the consideration for the sale, suggesting that the parties still sought to maintain the relationship of creditor and debtor and that they expected that the enjoyment of the property for three years would give them by way of profits much more than the interest accruing on the debts. At the conclusion of the document the parties specifically described the term for reconveyance as a condition for sale. The transaction is a mortgage by conditional sale.

Appeal against the decree of the Court of the Subordinate Judge, Thanjavur in Appeal Suit No. 16 of 1962, preferred against the Decree of the Court of the District Munsif of Tiruvaiyaru in Original Suit No. 268 of 1961.

R. Gopalaswami Ayyangar and *K. N. Balasubramanian*, for Appellants.

K. S. Desikan and *K. Raman*, for Respondents.

The Court delivered the following

JUDGMENT.—The short question for determination in this Second Appeal is whether the document Exhibit B-1 was an outright sale with an agreement to reconvey, or a mortgage by conditional sale as defined in section 58 (*c*) of the Transfer of Property Act. The view of the Courts below was that it was a mortgage by conditional sale; hence the defendant, the aggrieved party, has filed this Second Appeal.

The plaintiffs' case was briefly the following. The suit properties are situated within the municipal limits of Thanjavur, and belonged to one Kaliaperumal Pillai, the undivided father of the plaintiffs, and his younger brother Krishnaswami. They borrowed amounts from one Janaki Ammal and in settlement of these debts the suit document, Exhibit B-1, dated 18th April, 1939, was executed, ostensibly as a sale deed, but, in essence, it was only a mortgage. Janaki Ammal died shortly

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* S.A. No. 1876 of 1962. 20th April, 1965.

before the suit, and before her death, she appointed the defendant as her executor, to manage her estate, and the defendant is in management of the suit properties. The plaintiffs' father died fifteen years ago, and the plaintiffs have succeeded to his estate by survivorship. The plaintiffs filed the suit for redemption of the mortgage, Exhibit B-1. The defendants pleaded that the document was an out-right sale with a covenant for repurchase. They also denied the plaintiffs' right to the benefits of section 9-A of Act IV of 1938.

The document is in Tamil and can be rendered thus in English :

"We have today executed the sale deed in your favour of the under-mentioned property and the consideration therefor of Rs. 2,550 is made up in the following manner :

(1) by discharge of a prior simple mortgage, dated 20th July, 1924 for Rs. 2,000 over item No. 1—amount received Rs. 1,850 ;

(2) by discharge of a mortgage, dated 12th July, 1937 for Rs. 600 over item No. 2 and other items after scaling down the interest under Act IV of 1938—Rs. 450 ;

(3) amount due towards principal and interest on a promissory note, dated 12th July, 1937, for Rs. 250—total Rs. 2,250.

We have given you the abovesaid property with absolute rights to it. Excepting the two mortgages aforementioned, there are no other encumbrances on this property. Out of the consideration of Rs. 2,550 for this sale deed, if we pay you Rs. 2,050 within three years from today, you shall reconvey the properties to us. Subject to this condition this deed of sale is executed."

The main circumstances to be borne in mind in regard to this transaction are the following : For the entire amount of consideration of Rs. 2,550 no amount by way of cash was paid. The entire amount represented prior debts under two simple mortgages and a promissory note. An effort was made deliberately to show in the document that the amount of consideration represented the amount of the prior debts after adjusting amounts already paid or after scaling down amounts by way of interest under Act IV of 1938. A conscious intention to show that the relationship of debtor and creditor subsisted between the two parties up to the time of the execution of the document is thus apparent. In 1924 item No. 1 property was capable of raising Rs. 2,000 by way of simple mortgage. In 1939 item No. 1 property supplemented by three more items, which include four mahs or 1 1/3 acre of cultivable land, a garden land containing topes and gardens and another garden land containing bamboo clusters, were all sold for Rs. 2,550. No attempt was made in the lower Courts to show how the price of the property varied in the locality between 1924 and 1939, whether there was an upward trend or a downward trend. The lower appellate Court, however, was prepared to consider that from the recital of the document alone, it would appear that the property covered by Exhibit B-1 was worth on the date of Exhibit B-1 much more than Rs. 2,550. This is a finding of fact and I am not prepared to interfere with it, though it would have been a better if the lower appellate Court had supplemented its observation, by reference as to how the trend of the prices of property had varied from 1924 to 1939.

A further point is that the consideration for the reconveyance, Rs. 2,050, is Rs. 500 less than the consideration for the sale. This must be viewed as a very unusal feature in such a transaction. Learned Counsel, Sri R. Gopalaswami Iyengar, appearing for the appellant, urged that this should be taken as a crucial test to show that the transaction was a sale rather than a mortgage. On the other hand, learned Counsel for the respondents Sri K.S. Desikan urged that the reason for the reduction of Rs. 500, was that the parties still sought to maintain the relationship of creditor and debtors, that they expected that the enjoyment of the property by the creditors for three years from 1939, would give them by way of profits, much more than the interest which would accrue on the debts during that period and that it was to provide for this circumstance, that they gave a reduction of Rs. 500 in the amount stipulated for obtaining a reconveyance. It does seem very unusual that a person buying property in 1939 would have anticipated that three years later the property would be worth Rs. 500 less. Even assuming that there was a retrograde trend in prices up to 1939, no reasonable person would anticipate a further fall, and try to provide for it by fixing a lesser amount for obtaining a reconveyance three years later. In the above circumstances the explanation given by the learned Counsel for the

respondents appears to be more reasonable, for the deliberate reduction in the amount fixed for the reconveyance of the property three years later.

One other circumstance appears to be relevant. At the conclusion of the document the parties specifically described the term for reconveyance as a condition of the sale. Therefore they intended that the term for reconveyance should be a condition attached to the original transfer of the property: this is a circumstance more consistent with a mortgage than sale.

Several decisions were cited before me by both sides. In *Ramachandrayya* v. *Laxminarayana Rao*[1], Krishnaswamy Nayudu, J., observed :

" Where it is found that there was a prior relationship of debtor and creditor between the parties that the stamp papers for the document were purchased in the name of the transferor, that the price fixed was not the result of bargaining, but represented the exact amount of the pre-existing debt due by the vendor to the vendee, and the price too was not a fair or proper price, there can be no room for any doubt that the transaction is and intended to be only a mortgage by conditional sale. "

In 1956 Ramaswami, J., had to consider two different types of cases. In the decision reported in *Kulathu Iyer* v. *Manickavasagam Pillai*[2], there was evidence to show that the amount at which the price was settled was much lower than the amount due under the earlier debts. The parties described the document as "*vayida crayam*" in contradiction to the usual phrase "*suddha crayam*". The sale price given in round figures was also the price to be given by the vendor after a stipulated period. There was nothing to show that any interest was payable. But, as mentioned already, in this case, the document recites that the amount of the sale price was the amount arrived at after calculation, of the amount due under the prior debts less adjustment for repayment or scaling down and the price for the reconveyance is less than the price for the sale. In *B. A. Khan* v. *Nawaz Khan*[3], the learned Judge had to coniisider a different type of transaction, where he catalogued five tests to be applied in similar cases. But it appears to me that the facts of each case have to be considered independently and that any prescription of standardised tests may not be sufficient to meet all situations. In *Bhaskar Waman Joshi* v. *Shri Narayan Rambilas Agarwal*[4], the Supreme Court observed that :

" the question in each case was one of determination of the real character of the transaction, to be ascertained from the contents of the deed, viewed in the light of surrounding circumstances. The circumstance that the condition (of reconveyance) is indicated in the sale deed has undoubtedly to be taken into account, but the value to be attached thereto must vary with the degree of formality attending upon the transaction. "

In my opinion, the circumstances of this case are more consistent with the transaction being one of a mortgage by conditional sale, than an outright sale, with an agreement for reconveyance. In this view, I confirm the decision of the lower appellate Court, and dismiss the Second Appeal. There shall be no order as to costs in the Second Appeal. No leave.

V.S. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE T. VENKATADRI.

Mohammad Sayeed .. *Petitioner* *

v.

M. S. Mohamad Jaffar and another .. *Respondents.*

Constitution of India (1950), *Article* 133 (1) (a), (b) *and* (c)—*Suit claiming right to joint Muthawalliship in a wakf involving properties worth more than Rs.* 20,000—*High Court decreeing suit reversing decision of Court below—Case involving no substantial question of law—Appeal to Supreme Court—Certificate under Article* 133, *if can be granted.*

Whenever a right for joint Muthawalliship or trusteeship is involved in a suit the pecuniary value of it would be incapable of valuation. Where, therefore, a suit filed by the plaintiff claiming that he is

1. (1956) 2 M.L.J. 565.
2. (1956) 1 M.L.J. 385.
3. (1956) 1 M.L.J. 388.
4. (1960) 1 M.L.J. (S.C.) 87: (1960) 1 An. W.R. (S.C.) 87: 1960 S.C.J. 327.

* S.C.P. No. 210 of 1964 in A. No. 138 of 1961. 29th April, 1965.

entitled along with the defendant to joint Muthawalliship of a *wakf* is decreed by the High Court reversing the decision of the Court below, the defendant cannot invoke Article 133 (1) (*a*) or (*b*) of the Constitution of India (1950) for the purpose of obtaining leave to appeal to the Supreme Court as the real subject-matter in dispute between the parties *viz.*, claim to joint Muthawalliship, would be incapable of valuation and when such a case does not involve any substantial question of law leave to appeal cannot be granted even under Article 133 (1) (*c*).

Petition under Article 133, clause (1) (*a*) and (*c*) of the Constitution of India and sections 109 and 110, Civil Procedure Code and Order 45, rules 2, 3, 7 and 8, Civil Procedure Code praying that in the circumstances stated therein and in the grounds of appeal to the Supreme Court of India the High Court will be pleased to grant leave to the petitioner herein to appeal to the Supreme Court of India against the Judgment of the High Court dated 17th September, 1963, and passed in A.S. No. 138 of 1961 preferred to the High Court against the decree of the City Civil Court at Madras dated 19th July, 1960, and passed in O.S. No. 2292 of 1959.

M. S. Venkatarama Iyer and *M. S. Muhammed Yahya*, for Petitioner.

M. K. Harihara Iyer, for 1st Respondent.

M. M. Ismail, for 2nd Respondent.

The Order of the Court was made by

Venkatadri, J.—This is a petition for leave to appeal to the Supreme Court from the judgment and decree of this Court in Appeal Suit No. 138 of 1961, to which one of us was a party which reversed the judgment and decree of the City Civil Court in O.S. No. 2292 of 1959.

This petition arises out of a suit filed by the first respondent herein for a declaration that he was entitled along with the petitioner herein to manage the *wakf* properties created by one Magdoom Mohamed Maraicayar, the maternal uncle of the petitioner herein. The founder of the said wakf, Magdoom Mohamed Maraicayar created a wakf *alal aulad* or family wakf by a registered deed dated 27th August, 1924, appointing himself as the first Muthawalli, and after his lifetime, appointing the father of the first respondent and the father of the petitioner as joint Muthawallis. The deed also provided that if one of the Muthawallis died, the other should function singly. It further provided according to the first defendant, that, after the death of the two joint Muthawallis, the eldest of the male issues of the aforesaid Muthawallis should alone be Muthawalli. The contention of the petitioner was that, after the death of the two aforesaid Muthawallis, *viz.*, the father of the petitioner and the father of the first respondent, he alone was entitled to be the Muthawalli, as he was the eldest of the male issues. The trial Court dismissed the suit of the first respondent and declared that he could not claim to be the joint Muthawalli along with the petitioner. But, on appeal, the said decision was reversed, and it was declared that the first respondent was entitled to act along with the petitioner, as joint Muthawalli in respect of the wakf properties created by Magdoom Mohamed Maraicayar. It is against this judgment and decree, that the first defendant has preferred this petition for leave to appeal to the Supreme Court.

Learned Counsel for the petitioner contended that he was entitled to a certificate, as the judgment of this Court was one of reversal of that of the Court below and as the pecuniary value of the subject-matter of the dispute both in the Court below and in appeal was above Rs. 20,000, as given by the first respondent herein. If the value of the subject-matter in dispute between the parties was capable of determination and if it was then determined at Rs. 20,000 by the first respondent, this argument of learned Counsel for the petitioner would have force. The petitioner would then be entitled to grant of leave as a matter of right under Article 133 of the Constitution. But the real question that arises for determination is, what is the subject-matter in dispute between the parties in action. The first respondent filed a suit for declaration that he was entitled to act along with the petitioner as joint Muthawalli. It is difficult to estimate the pecuniary value of the joint right of a Muthawalliship in a wakf.

Cases have frequently arise in Courts, in which the subject-matter of the dispute between the parties is the trusteeship, in which the question arose whether the trusteeship as such was capable of valuation. In *Balarami Reddi* v. *Shaik Masthan Sahib*[1], a Division Bench of this Court consisting of Govinda Menon and Basheer Ahmed Sayeed, JJ., held as follows :

"Where a wakf in question related to property worth admittedly more than Rs. 50,000 but the question decided in the Second Appeal was with respect to the trusteeship of the mosque and the subject-matter of the appeal to the Supreme Court is whether the plaintiff has the right to function as trustee, it cannot be said that the subject-matter of the suit is capable of valuation and as such section 110 (1) of the Civil Procedure Code and Article 133 (1) (*a*) of the Constitution cannot in strict terms apply. Though there was an ancillary prayer for recovery of possession of properties and sums of money on a rendition of accounts and a prayer for a permanent injunction restraining the defendant and his men from interfering with the plaintiff's right to manage the mosque and its endowments still the essential subject-matter of the suit is the post of the trusteeship of the mosque and nothing more. The other reliefs automatically follow if it is found that the plaintiff is the validly appointed trustee. If the plaintiff's title is negatived then the other reliefs cannot be granted. Accordingly Article 133 (1) (*a*) of the Constitution and section 110 (1) of the Civil Procedure Code cannot be invoked. Where the case does not involve any substantial question of law leave to appeal must be refused."

This decision seems to be an authority for the proposition, *viz.*, that, whenever and wherever there is a claim either for joint Muthawalliship or joint trusteeship, it is incapable of valuation. There are several unreported decisions of this Court which have followed the Division Bench. It is enough to refer only to the latest on the subject *Chokkalinga Sethurayar* v. *Arumainayagam*[2] where Ramachandran Iyer, Chief Justice and Ramakrishnan, J., followed the decision of Govinda Menon and Basheer Ahmed Sayeed, JJ., The learned Chief Justice observed thus :

"It is now admitted before us that independent of the question regarding trusteeship there is no controversy in regard to title to the properties involved in the suit. In other words it was conceded that possession of the properties would be taken by the person who would be declared by the Court to be the trustee. The question therefore arises what is the value of the subject-matter in dispute. Precisely the same question arose for consideration in *Balarami Reddi* v. *Shaik Masthan Sahib*[1] where a bench of this Court held that a prayer for recovery of possession of properties under those circumstances could only be held to be incidental and that the subject-matter of the appeal should be regarded as relating to the office of trusteeship which being incapable of valuation would not come under Article 133 (1) (*a*) of the Constitution.

Therefore it seems to us that there is consistent authority as far as this Court is concerned that whenever a right for joint Muthawallihip or joint trusteeship is involved in a suit, the pecuniary value of it would be incapable of valuation. We are not inclined to disagree with the proposition of law laid down by two Division Benches of this Court.

Learned Counsel for the petitioner contended that under Article 133 (1) (*b*) the judgment in question involves directly or indirectly some claim or question respecting property of more than Rs. 20,000. Admittedly, the properties involved are worth more than Rs. 20,000. But the reasoning of Govinda Menon and Basheer Ahmed Sayeed, JJ., seems to be convincing and acceptable, *viz.*, that the question of Muthawalliship relates only to the office and not to the properties. The prayer in the plaint was for declaration that the first respondent was entitled to act as a Muthawalli along with the petitioner herein. That being so, the relief is incapable of valuation. Therefore following the reasoning of the Bench decisions, we are inclined to hold that the petition is not maintainable, as it does not satisfy the requirements of Article 133 (1) (*a*), (*b*), or (*c*) of the Constitution. We cannot say that there is any substantial question of law.

The application is dismissed. No costs.

V.K. *Application dismissed.*

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1. (1953) 2 M.L.J. 276.
2. S.C.P. No. 28 of 1960.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

N. S. Kantan .. *Petitioner**

v.

The Agricultural Income-tax Officer, Ootacamund .. *Respondent.*

Madras Agricultural Income-tax Act (V of 1955), sections 29, 34, 54—Scope—Order of officer declining to accept case of partition pleaded by assessee—Assessee preferring a revision to Commissioner instead of prescribed appeal—Order of Commissioner declining to interfere—Revision to High Court—Order of Commissioner, not one 'enhancing the assessment or otherwise prejudicial to the assessee'—Revision not maintainable.

The Agricultural Income-tax Officer passed an order declining to accept the case of partition set up by the assessee. The assessee, instead of filing an appeal to the Assistant Commissioner, straightaway filed a revision to the Commissioner who declined to interfere. The assessee filed a revision against the order of the Commissioner to the High Court under section 54 of Madras Act V of 1955. On a preliminary objection raised by the State as to the competency of the revision.

Held, the Revision Petition to the High Court is not maintainable.

No revision would lie under section 54 of the Act to High Court as the order passed by the Commissioner rejecting the revision filed before him under section 34 of the Act is not an order "enhancing the assessment or otherwise prejudicial to th assessee."

The words "otherwise prejudicial to assessee" have acquired a clear and well-defined meaning and an order of the Commissioner declining to interfere is not an order, "otherwise prejudicial to the assessee."

Petition under section 54 (1) of Madras Agricultural Income-tax Act, 1955 and under section 36 praying the High Court to revise the Order of the Commissioner of Agricultural Income-tax, Madras, dated 30th June, 1962, and made in R.P. No. 364/60-61 presented to revise the Order of lhe Agricultural Income-tax Officer, Ootacamund, dated 10th January, 1961, and made in G.I.R. No. 14-*n*/59-60.

O. K. Sridevi, for *S. Padmanabhan, V. Venkatesan* and *N. Narayanaraj*, for Petitioner.

G. Ramanujam, for *A. Alagiriswami*, Government Pleader, for Respondent.

The Judgment of the Court was delivered by

Ramamurti, J.—The petitioner in this case made a claim before the Agricultural Income-tax Officer, Ootacamund, for recognition and acceptance of a partition amongst members of his family. But the Agricultural Income-tax Officer for reasons (the correctness of which it is unnecessary to consider now) declined to accept the case of partition. Thereupon the petitioner, without filing an appeal as provided in the Agricultural Income-tax Act (hereinafter referred to as the Act) straightaway preferred a revision petition to the Commissioner for Agricultural Income-tax under section 34 of the Act and he too dismissed the petition. The petitioner has thereupon preferred this Revision Petition under section 54 of the Act.

The learned Government Pleader raised a preliminary objection that no revision lies in the instant case under section 54 of the Act as the order passed by the Commissioner rejecting the revision application filed before him under section 34 is not an order *enhancing the assessment or otherwise prejudicial to him* (*the assessee*). On an examination of the relevant provisions of the Act and decisions bearing on the question, we are of opinion, that this preliminary objection should be upheld.

We shall now examine the relevant provisions of the Act. Section 29 provides for an assessment based upon a claim for partition. Section 31 provides amongst

* Tax Case No. 70 of 1963. 11th August, 1964.

other things that an assessee can prefer an appeal to the Assistant Commissioner against an order of the Agricultural Income-tax Officer passed under section 29 of the Act. Section 32 provides a right of appeal to the Appellate Tribunal against any order passed by the Assistant Commissioner under section 31 aforesaid. Section 32 (7) provides that save as provided in section 54 the orders passed by the Appellate Tribunal on appeal shall be final. Side by side there is also the provision in section 34 under which the Commissioner can call for the records of any proceeding under the Act and revise the same either on his own motion or on an application by the assessee. Section 34, in so far as it is relevant for the present purpose, runs as follows :

"(1) The Commissioner may, of his own motion or on application by an assessee, call for the record of any proceeding under this Act which has been taken by any authority subordinate to him and may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act, may pass such orders thereon as he thinks fit ;

Provided that he shall not pass any order prejudicial to an assessee without hearing him or giving him a reasonable opportunity of being heard ;

Provided further that an order passed declining to interfere shall not be deemed to be an order prejudicial to the assessee.

. . . .

(4) Any order passed under sub-section (1), shall, subject to revision by the High Court under section 54, be final."

Section 54 which provides for the right of revision to the High Court runs as follows :

"(1) Within sixty days of the date on which he is served with a notice of the order, the assessee or the Commissioner, in the case of an order under sub-section (5) of section 32, and the assessee in the case of an order under section 34 enhancing the assessment or otherwise prejudicial to him, may prefer an application to the High Court against the order on the ground that the Appellate Tribunal or, as the case may be, the Commissioner has either decided erroneously or failed to decide any question of law :

Provided that the High Court may admit an application preferred after the period of sixty days aforesaid if it is satisfied that the applicant had sufficient cause for not preferring the application within that period."

The contention of the learned Government Pleader is that the Second Proviso to section 34 expressly provides that an order by the Commissioner declining to interfere in a revision petition filed by the assessee shall not be deemed to be an order prejudicial to the assessee, and that, therefore, by reason of the express language of section 54, a Revision Petition by the petitioner is incompetent, inasmuch as there is no order under section 34 enhancing the assessment or an order otherwise prejudicial to the assessee.

Learned Counsel for the petitioner contended that section 34 and section 54 are two separate provisions and the Second Proviso to section 34 should not be imported into sub-section (1) of section 54. In other words, it was contended on behalf of the petitioner that if a revision petition is filed under section 34 and the Commissioner dismisses the same it would certainly be an order prejudicial to the assessee within the meaning of section 54 as the Commissioner has declined to entertain the same. It was further contended that the Second Proviso to section 34 has only a limited operation as throwing some light upon the import and operation of the First Proviso to section 34 and apart from that, it has no other purpose, and cannot be used as a guide for determining the ambit of the right of revision provided under section 54 of the Act. We see no substance in this contention. In our opinion, the point is directly covered by the decision of the Privy Council in *Commissioner of Income-tax, Punjab* v. *Tribune Trust, Lahore*[1], a case which arose under the analogous provisions of the Indian Income-tax Act of 1922, sections 33 and 66, which contained language similar to the provisions of sections 34 and 54 of the Agricultural Income-tax Act. The matter is also directly covered by several decisions of the various High

1. (1948) 2 M.L.J. 14 : I.L.R. (1947) Lah. 809 (P.C.) : L.R. 74 I.A. 306.

Courts dealing with the analogous provisions of the Agricultural Income-tax Act in those States.

We shall now refer to the decisions which have arisen under the Indian Income-tax Act. Section 33 of the Indian Income-tax Act of 1922, conferred a *suo motu* power of revision upon the Commissioner. Section 66 of the Act contained the provision that the assessee can ask the Commissioner to refer the case to the High Court arising out of an order of the Commissioner under section 33 *enhancing an assessment or otherwise prejudicial to him (the assessee),*

In *Venkatachalam Chettiar* v. *Commissioner of Income-tax, Madras*[1], the assessee applied to the Income-tax Officer for a refund and when it was dismissed he filed a revision petition to the Commissioner under section 33 and the Commissioner too rejected the same. Thereupon there was an application by the assessee to the Commissioner to state a case and refer the question to the High Court but the Commissioner declined to do so on the ground that the order under section 33 dismissing the revision petition was not an order *enhancing the assessment or otherwise prejudicial to the assessee* and, therefore, the assessee had no right of reference to the High Court. This Court held that the view taken by the Commissioner that the order of the Commissioner dismissing the revision petition under section 33, is not *otherwise prejudicial to the assessee* was correct on the ground that the order of the Commissioner under section 33 had not prejudiced the assessee, that the order did no more than leave the assessee in the position which he occupied as a result of the order of refusal by the Income-tax Officer and that the further order of the Commissioner affirming the order of the Income-tax Officer was not an order prejudicial to the assessee within the meaning of section 66. It is unnecessary to refer to the other cases under the Income-tax Act and it is sufficient to refer to the judgment of the Privy Council referred to above.

In *Commissioner of Income-tax, Punjab* v. *Tribune Trust Lahore*[2], the assessee, a trust raised an objection for the assessment year 1932-33 that its income was exempt from income-tax under section 4 (3) (i) of the Act. Upto the stage of the High Court the assessee failed in its contention. But the Privy Council upheld its claim. In the meanwhile in view of the decision of the High Court, assessment for subsequent years were made and completed in accordance therewith. After the decision of the Privy Council the assessee filed an application to the Commissioner of Income-tax under section 33 that the assessment for the subsequent years might be quashed but the Commissioner rejected the same. Thereupon the assessee applied to the Commissioner of Income-tax to state a case and refer the same to the High Court under section 66 (2) of the Income-tax Act. The Commissioner declined to do so and the assessee moved the High Court for directing the Commissioner to state a case. This was allowed by the High Court and the Commissioner took up the matter to the Privy Council. The Privy Council held that the Commissioner was not bound to state a case within the meaning of section 66 (2) of the Act as the order of the Commissioner dismissing the assessee's petition was not an *order enhancing the assessment or prejudicial to the assessee* within the meaning of section 66 (2). The Privy Council did not accept the view of the High Court that when the assessee's application has been dismissed by the Commissioner declining to grant the relief prayed for by the assessee it amounted to an order prejudicial to the assessee. The Privy Council put the matter thus at page 826 :

"It appears to them that an order made by the Commissioner under section 33 can only be said to be prejudicial to the assessee when he is, as a result of it, in a different and worse position than that in which he was placed by the order under review. If the assessee has a complaint against any assessment or order made by a subordinate officer, he has the appropriate and specific remedy which the Act provides. The Commissioner may act under section 33 with or without the invitation of the assessee: if he does so without invitation, it is clear that, if he does nothing to worsen the position of the assessee, the latter can acquire no right: the review may be a purely departmental matter of which the assessee knows nothing. If, on the other hand, the Commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification

1. (1934) 68 M.L.J. 227 : I.L.R. 58 Mad. 367.
2. (1948) 2 M.L.J 14 : I.L.R. (1947) Lah. 809 (P.C.) : L.R. 74 I.A. 306.

for giving him a new right of appeal. He has a specific right of appeal against the assessment or order of the subordinate officer, which is subject to its own time limit. That he cannot enlarge by taking a course which is on his part purely voluntary. This view of the section is confirmed by the exception."

In *Senairam* v. *Assam Board of Agricultural Income-tax*[1], the Bench of the Assam High Court had to deal with a similar situation arising under the Assam Agricultural Income-tax Act (XI of 1939). It was held that an order of a Commissioner under section 27 of the said Act declining to interfere with an order of assessment by the Agricultural Income-tax Officer cannot be said to be an order prejudicial to the assessee within the meaning of section 28 (2). There too the assessee did not avail himself of the right of appeal against the order of the Income-tax Officer under section 24 of the Act but filed an application under section 27 by which he sought to set aside the assessment order and the Commissioner of Income-tax declined to interfere. The High Court took the view that the observations of the Privy Council regarding the proper meaning to be given to the words *order prejudicial to the assessee* would apply to the analogous provisions of the Assam Agricultural Income-tax Act.

A Bench of the Kerala High Court took the same view with regard to the analogous provisions of the Cochin Income-tax Act in *Parvathi Sankaran* v. *The Commissioner of Income-tax*[2]. The Bench held that an order of the Commissioner dismissing a revision petition filed before him cannot be said to be an order prejudicial to the assessee within the meaning of section 109 (2) of the Cochin Income-tax Act so as to entitle the assessee to obtain a reference to the High Court. It is sufficient to mention that in this case reliance was placed upon a later judgment of a Full Bench of five Judges of the Madras High Court in *Sreeramulu* v. *Commissioner of Income-tax, Madras*[3] overruling the earlier Full Bench decision of three Judges in *Venkatachalan Chettiar* v. *Commissioner of Income-tax, Madras*[4], already referred to as authority for the position, that an order dismissing a revision petition must be deemed to be an order prejudicial to the assessee as the relief asked for by him was refused as the dismissal itself amounts to refusal to grant the relief prayed for by the assessee. The Kerala High Court took the view that in view of the decision of the Privy Council in *Tribune Trust's case*[5], the view of the later Full Bench of the Madras High Court cannot be followed as good law.

In *Onkarmal* v. *Income-tax Commissioner, Assam*[6], the matter arose, before the Full Bench of the Assam High Court in a case arising under the analogous provisions of the Assam Sales Tax Act, section 32 (2). Section 31 of the Assam Sales Tax Act provided that the Commissioner may call for the record of the proceedings of the assessment either on his own motion or on a petition filed by the assessee and pass any order after revising the proceedings. Section 32 (2) provided that the assessee can file an application requiring the Board or the Commissioner to refer the case to the High Court from the order of the Commissioner enhancing the assessment or otherwise prejudicial to the dealer. Dealing with the identical objection the learned Judges stated the position in these terms:

"This dictum of the Privy Council categorically supports the contention of the learned Advocate-General as to the meaning of the words 'prejudicial order'; and applying this test, it is impossible to hold that the orders in the present case fulfilled the requirements of section 32 (2) of the Sales Tax Act, as analysed by me earlier. I do not think it necessary to refer to some of the other cases cited on the point. That being so, the contention must be upheld that these applications under sub-sections (5) and (6) of section 32 are also incompetent, there being no valid application under sub-section (2) of that section."

In the Assam case an argument was advanced to distinguish the decision of the Privy Council on the ground that under section 33 of the Income-tax Act of 1922, the Commissioner alone had a power of revision while under the Assam Sales Tax

1. I.L.R. (1951) Assam 176: A.I.R. 1951 Assam 121.
2. I.L.R. (1959) Ker. 946.
3. (1939) 2 M.L.J. 68: I.L.R. (1939) Mad. 358: A.I.R. 1939 Mad. 709 (F.B.).
4. (1934) 68 M.L.J. 227: I.L.R. 58 Mad. 367.
5. (1948) 2 M.L.J. 14: I.L.R. (1947) Lah. 809 (P.C.): L.R. 74 I.A. 306.
6. I.L.R. (1953) Assam 389: A.I.R. 1954 Assam 139, 142 (F.B.).

Act the power of revision can be exercised by the Commissioner either on his own motion or on an application of the assessee, and that when a statutory right of revision is given and the revision petition of the assessee is dismissed such an order should be deemed to be an order prejudicial to the assessee. This argument was rejected as follows at paragraph 21 of the decision:

"It is next argued that section 33 of the Act, as quoted in the judgment of the Judicial Committee did not concede any statutory right to the assessee to move the Commissioner of Income-tax to revise the order of assessment; it only gave an authority to the Commissioner to call for the record of any case on its own motion and pass such orders after enquiry as he thought fit. Therefore if after calling for the record, the Commissioner refused to interfere, the assessee had evidently no statutory right on the authority of which he could apply for a reference to the High Court. It must be conceded that section 33, as it then was, did not give any right to the assessee to move the Commissioner, or impose any obligation upon the latter to do so. Accordingly their Lordships took the view that it was intended to provide merely an administrative machinery by which a higher executive officer might review the acts of his subordinates and take necessary action on such review. This point did not and could not affect their decision as to the interpretation of the words 'prejudicial order,' which was quite independent of the consideration whether the petitioner had or had not any statutory right to move the Commissioner for review."

In fact their Lordships clarified the position in no ambiguous terms as their following observation shows:

"The Commissioner may act under section 33 with or without the invitation of the assessee; if he does so without invitation it is clear that, if he does nothing to worsen the position of the assessee the latter can acquire no right: the review may be a purely departmental matter of which the assessee knows nothing. If, on the other hand, the Commissioner acts at the invitation of the assessee and again does nothing to worsen his position, there is no justification for giving him a new right of appeal."

The distinction, therefore, pointed out by the learned Counsel for the petitioners is of no moment at all.

We are clearly of the opinion that the words *otherwise prejudicial to the assessee* have acquired, so to say, a clear, well-defined meaning in the manner mentioned above and they are used in the Madras Agricultural Income-tax Act in the same context and with the same object.

In this connection it may also be mentioned that the view of the Privy Council in the *Tribune Trust's case*[1], which was rendered under the unamended section 33 of the Act has been given statutory effect by the second proviso to sub-section (2) of section 33-A of the Income-tax Act, which enacts that *an order by the Commissioner declining to interfere shall not be deemed to be an order prejudicial to the assessee.*

However much this view might cut down the right of revision of the assessee to the High Court, it has to be upheld in view of the clear language of the section.

We, therefore, uphold the preliminary objection and dismiss the Revision Petition as not maintainable under section 54. There shall be no order as to costs.

V. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE M. ANANTANARAYANAN AND MR. JUSTICE M. NATESAN.

Govindaswami .. *Applicant.**

Penal Code (XLV of 1860), section 84—Benefit of exemption under on the ground of insanity—When can be claimed.

To attract the provisions of section 84 of the Indian Penal Code, it must be established that the person, at the time of doing the act, was by reason of unsoundness of mind incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It must be clearly established that, when the act was committed the accused was labouring under such a defect of reason as not to know the nature and quality of the act he was doing or if he did know it that he did not know he was doing what was wrong. Merely establishing that sometime prior to the occurrence the accused had suffered from derangement of the mind and that even subsequently he had behaved in a strange manner or had been taciturn, moody or saturnine will not be sufficient to bring his case under the exemption under section 84 of the Penal Code.

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1. (1948) 2 M.L.J. 14 : I.L.R. (1947) Lah. 809 (P.C.) : L.R. 74 I.A. 306.

*Criminal Appeal No. 109 of 1964. 16th July, 1964.

There is no basis on the evidence in the instant case for a finding that at the time the accused killed his father he was of unsound mind and was incapable of knowing what he was doing or that he was doing wrong. The trial Court observed that the accused looked a little saturnine ; if by that it is meant that he was grave or gloomy it means little and the accused cannot claim the benefit of the exemption under section 84 of the Penal Code.

Appeal against the Judgment of the Additional Sessions Judge of the Court of Sessions of the Coimbatore Division at Coimbatore in Case No. 169 of the Calendar for 1963, dated 15th January, 1964.

S. Swamikkannu (*amicus curiae*), for accused.

Public Prosecutor (*V. P. Raman*), for State.

The Judgment of the Court was delivered by

Natesan, J.—One Govindaswamy, who has been convicted and sentenced to imprisonment for life under section 302, Indian Penal Code, for the murder of his father, Kondathu Goundar, is the appellant.

That Kondathu Goundar died of homicidal violence at the hands of the accused-prisoner is established beyond reasonable doubt by the evidence on record. The real question for consideration, however, is whether the appellant is entitled to the benefit of the exemption provided in section 84, Indian Penal Code.

The deceased, Kondathu Goundar, first married one Kaveri, by whom he had two daughters, Venkatammal and Saraswathi, and two sons, Govindaswami (accused) and Gopal (P.W. 5). The daughters are not yet married. On the death of Kaveri about ten years prior to the occurrence, he married her sister, Rajammal (P.W. 1). P.W. 1 speaks to the relevant circumstances preceding the occurrence. The deceased is stated to have sold about thirteen acres of fertile land of the family out of thirty acres owned to P.W. 1, and this was resented by the accused. P.W. 1 states that the accused beat her on two or three occasions, and her husband, the deceased, not being able to control the accused, she left for her father's house at Sadimugai, twelve miles from Kothamangalam. Proposals for the marriage of the two daughters had been made. The eldest daughter was to be married to her brother and the next one was to be married to P.W. 2. The deceased and his children were living at Karachikorai near Kothamangalam about one mile from Chakkilian Thottam which had been sold to P.W. 1. There is evidence that the accused used to pester P.W. 1 even at her father's place, and a week before the occurrence he had stayed there for about 3 or 4 days worrying her for his share in the Chakkilian Thottam and desiring that he should be got married. P.W. 1 appears to have pacified him, promising to do the needful after the daughters were got married. P.W. 1 deposes that the accused left the place with threats of violence to her and her husband.

P.W. 2, who is an eye-witness to the occurrence, speaks to his being with the accused and the deceased at Chakkilian Thottam on the night of the occurrence. He had gone to meet the deceased for settling the marriage and, all the three went to the Thottam to sleep there. On the way, the accused demanded of his father (the deceased) his share. P.W. 2 states that the deceased said that he would give a share after the two daughters were married and not before. The demand of the accused for a sum of Rs. 2,000 to start a tea and biscuit shop was also overruled by the deceased, who asked him to work on the land till the two daughters were married. All the three, the deceased, the accused and P.W. 2, went to bed at the *kalam* in Chakkilian Thottam. There was an electric light burning. The deceased slept on a mat north of the place where the accused went to bed, about six feet from the accused. P.W. 2 slept on a cot about six feet at the south of the accused. At about 4 A.M., he heard a noise and waking up saw the accused cutting the deceased with an aruval at the place where the deceased was sleeping. He saw him deliver two cuts on the neck of the deceased. P.W. 2 deposes that, when questioned, the accused moved towards him with the aruval, and getting frightened he took up a stick (M.O. 1) and wielding it ran away to the *shalai* in a field about 1¼ furlongs away and woke up P.W. 3 and P.W. 4. At day break, P.W. 2 came to the scene of occurrence along with P.W. 3 and P.W. 4 and found the deceased lying dead with injuries. The

accused was not there. Immediately P.W. 2 met P. W. 5 another son of the deceased and informed him of what all happened. Then he gave information to the Village Munsif of Bagadathorai (P.W. 10). The first cousin of the deceased (P.W. 6) came to know of the occurrence from P.W. 5 about 7 A.M. and he reported the occurrence to the Village Munsif, Kothamangalam (P.W. 7).

It is needless to refer to the further steps taken by the authorities in the matter of investigation and apprehension of the accused The accused was arrested by P.W. 11 the next day *i.e.*, 31st October, 1963 at Chithalaikuttai forest. On autopsy conducted by P.W. 8, the Medical Officer attached to the Government Hospital, Satyamangalam seven incised wounds and two lacerated wounds were found on the body of the deceased. Injury No. 6, a lacerated wound 5 inches by 4 inches by 3 inches on the left side of the neck showed that internally, the external jugular vein, the internal jugular vein, external and internal carotid arteries had been cut. There was also fracture of the fourth and fifth cervical vertebra and those bones had been broken into multiple pieces. P.W. 8 deposes that injury No. 6 is necessarily fatal and death would have been instantaneous.

In the Committal Court, the accused admitted that he cut his father. He admitted that on the way to Chakkilian Thottam, he had asked for partition of the shares and for money to open a shop and that he (deceased) refused. When questioned in the Sessions Court under section 342, Criminal Procedure Code, he stated that the deceased was not his father, that the deceased had told him that he should go away and do work, that the deceased gave him trouble and said that he was mad, that he took him to Tirumurugan temple and kept him there and wanted him to be killed and that he was found to be sane. He, however, admits that he had asked the deceased to provide him with a shop but would state that the deceased said that the accused was not in proper senses and should be taken to Kunimuthur. The accused admits all the three (P.W. 2, the deceased and the accused) going to bed at the *kalam* on the night of the occurrence. However, he says, that, at about 8 P.M. P.W. 2 and the deceased brought an *aruval* and woke up the accused and that the deceased aimed a cut at him and that he snatched the aruval from the deceased and cut him. The deceased got up and pushed him and P.W. 2 went to *Shalai*; and he went to Karachikorai and then to Chithalaikuttai forest. He states that when he cut the deceased, he was not dead, that the deceased pushed him aside and that he did not know other things. He would have it that his father was one Kandaswamy Goundar that he was no more and that the deceased was the *pannaiyal* of his father.

It may be noticed here that there was no suggestion to P.W. 1, the sister of Kaveri who was admittedly the mother of the accused, that the deceased was not the husband of Kaveri. No such suggestion has been made to P.W. 5 the brother of the accused, and in the committal Court, the accused admitted that the deceased was his father. That apart for the consideration of the question whether the accused is guilty under section 320, Indian Penal Code, it is immaterial whether the deceased was the father of the accused or not. Equally unsubstantiated is the other case attempted at the trial that the deceased tried to strike the accused with an aruval and that the accused snatched the aruval and cut the deceased. P.W. 2, who is admittedly an eye-witness to the occurrence, has not been put any question on this aspect of the matter ; and this case also does not find a place in the answers given by the accused, when examined in the Committal Court. P.W. 2, the eye-witness, and P.W. 3 and P.W. 4, who affirm P.W. 2's reporting to them about the occurrence, have no ill-will towards the accused to perjure against him and to implicate him for the offence of murder. On the facts established P.W. 2 had ample opportunity to witness the occurrence. An electric light was burning near the scene of occurrence and even admittedly he had gone to bed with the accused and the deceased.

To take up for consideration the question whether the accused was mentally unsound; P.W. 1, in cross-examination, admits that seven or eight months previously the accused used to run away from the house, while he was demented. She states that she was not an eye-witness to that ; P.W. 1 deposes that the accused was chained in some *koil* and given some *Theertham* but no medicines were given and that she had

not been there. She states that the accused went to her house one week before the occurrence, when he was in a sound state of mind. P.W. 2 denies that the deceased stated, he (*accused*) *is mad, he should be driven away*. To the only quesion put to P.W. 3 in cross-examination, he has stated that the accused and his father were on good terms, so far as he knew. The only other person who has been questioned about the sanity of the accused is P.W. 5, the brother of the accused, aged about twenty. He states that the accused has studied up to S.S.L.C. class. He deposes, in cross-examination that seven or eight months prior to giving deposition (prior to January, 1964) the accused was demented, that he had been taken to the *kovil*, that he was not put in chains, that he was demented for 1½ months, that he was not taken to a doctor and that he was slightly better than before. He states that the accused was doing *attakasa* and was going away and coming back and would not sleep well. He admits that he cannot say that the accused is half mad. He did not know whether the accused would get beating from others.

The learned Sessions Judge remarks that the accused looked a little saturnine but was certainly sane. Now all that is found in the evidence is that, about several months back, the accused was in a demented condition and had been taken to Tirumuruganpoondi and kept there for a time. According to P.W. 5, he was demented for about one and a half months, seven or eight months prior to his giving deposition in January, 1964. That takes one to June, 1963. The occurrence was on 30th October, 1963, and at any rate, on the evidence of P.W. 5, by August the accused had got better. The evidence is not clear as to what exactly was the mental condition of the accused, during the period of dementia. The evidence does not show that at any time immediately preceding the occurrence, the accused was of unsound mind, and there is nothing on record to show that the subsequent mental history of the accused is anything not normal.

To attract the provisions of section 84, Indian Penal Code, it must be established that the person, at the time of doing the act, was, by reason of unsoundness of mind, incapable of knowing the nature of the act or that he was doing what was either wrong or contrary to law. It must be clearly established that, when the act was committed the accused was labouring under such a defect of reason as not to know the nature and quality of the act he was doing, or if he did know it that he did not know he was doing what was wrong. Merely establishing that some time prior to the occurrence the accused had suffered from derangement of the mind and that even subsequently he had behaved in a strange manner or had been taciturn moody or saturnine will not be sufficient to bring his case under the exemption. In *Queen Empress* v. *Kader Nasyer Shah*[1], it was made out in evidence that the accused had been suffering from mental derangement for some months prior to the day of occurrence, that he often complained of pain in his head and that on one occasion he was seen eating potsherds. It also appeared from the evidence that, when the enquiry, preliminary to the commitment, was taken up, he was found not to be in a fit state of mind to be able to make his defence and the enquiry had to be resumed after more than a year. The murder, it was found, was committed without any sane motive. After referring to the burden of proof under section 105 of the Evidence Act, with reference to section 84, Indian Penal Code it was observed as follows :—

"This provision of our law, which is in substance the same as that laid down in the answers of the Judges to the questions put to them by the House of Lords in *Mc Naghten's case*[2] shows that it is only unsoundness of mind which materially impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility, the nature and the extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the Act, or that he is doing what is wrong or contrary to law. Instances of unsoundness of mind of this description would be such as these. A person strikes, another, and in consequence of an insane delusion thinks he is breaking a jar. Here he does not know the nature of the Act. Or he may kill a child under an insane delusion that he is saving him from sin and sending him to heaven. Here he is incapable of knowing by reason of insanity that he is doing what is morally wrong. Or he may under insane delusion believe an innocent man whom he kills to be a man that was going to take his life ; in which

1. (1896) I.L.R. 23 Cal. 604, 607. 2. (1843) 10 Cl. & Fin. 200 (H.L.).

case, by reason of his insane delusion, he is incapable of knowing that he is doing what is contrary to the law of the land."

On the facts of the case, it was held that it had not been shown that the accused, at the time he killed the child, was, by reason of unsoundness of mind, incapable of knowing the nature of the act. In *State of Madhya Pradesh* v. *Ahamadulla*[1], it was affirmed that the burden of proof that the mental condition of the accused was, at the crucial point of time, such as is described by section 84 lay on the accused who claimed the benefit of this exemption. Their Lordships quoted with approval a passage in *Henry Perry*[2] the decision of the Court of Criminal Appeal in England, where the learned Chief Justice said :

"Every man is presumed to be sane and to possess a sufficient degree of reason to be responsible for his acts unless the contrary is proved. To establish insanity it must be clearly proved that at the time of committing the act the party is labouring under such defect of reason as not to know the nature and quality of the act which he is committing—that is, the physical nature and quality as distinguished from the moral—or, if he does know the nature and the quality of the act he is committing that he does not know that he is doing wrong............."

Judged in the light of the above principles, there is no basis on the evidence in this case, for a finding that, at the time of occurrence, the accused was of unsound mind incapable of knowing what he was doing or that he was doing wrong. The evidence makes it clear that the accused perfectly understood what he was about. The learned Additional Sessions Judge observed that the accused looked a little saturnine ; if by that it is meant that he was grave or gloomy it means little. He has been guilty of a heinous offence—patricide, and remorse must be on him. He has attempted to cover up the enormity of the crime by stating that the deceased was not his father. P.W. 1 and P.W. 2 are emphatic about the sane mental condition of the accused, about the time of the occurrence.

We are satisfied that the circumstances attending the murder, which have been established, go to show that the accused, who had been denied an immediate partition and also denied funds for starting some business and who had a grouse against his step-mother in whose favour his father had transferred valuable lands, has deliberately committed the crime knowing what he was about and that he was doing wrong.

The conviction under section 302, Indian Penal Code, and the sentence of imprisonment for life, which is the only sentence besides the sentence of death which the law prescribes for an offence under that section, are both confirmed, and the appeal is dismissed.

V.K. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K.S. RAMAMURTI.

The State of Madras, represented by the Deputy Commissioner of Commercial Taxes, Coimbatore Division, Coimbatore .. *Petitioner**

v.

The Tiruchengode Co-operative Marketing Society, Limited, Tiruchengode .. *Respondent.*

Madras General Sales Tax Act (I of 1959), sections 2 (g) (iii) and 2 (r) proviso—Scope of proviso to section 2 (r)—Benefit of proviso by whom can be availed of—When can be availed of by an agent who is a dealer within the meaning of section 2 (g) (iii).

Prima facie, the language of the proviso to section 2 (*r*) of the Madras General Sales Tax Act (I of 1959) implies that the person who is entitled to exemption thereunder should be a dealer selling the concerned agricultural produce and that the agricultural produce in question should have been grown within the State by the aforesaid dealer or grown on any land in which the aforesaid dealer has an interest whether as owner, usufructuary mortgagee, tenant or otherwise. Not every sale by an agriculturist of his produce would be a sale by a dealer. Such a sale must be for the purpose of the Sales

1. (1961) 2 S.C.J. 197 : (1961) M.L.J. (Crl.) 480 : A.I.R. 1961 S.C. 998.
2. 14 Crl.App. Rep. 48.

* T.C. No. 183 of 1963. 19th August, 1964.

Tax Act a sale in the course of business and where an agriculturist is merely selling produce surplus to his personal requirement that transaction by itself would not be a sale in the course of business.

Under the definition in section 2 (g) (iii) of the Madras General Sales Tax Act (I of 1959) a commission agent, a broker or a *del credere* agent or an auctioneer or any other mercantile agent by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal will be a dealer. But the terms used in this section to define a dealer should be applied only after finding out whether in a given case the assessee entered into a bargain amounting to a sale and this requirement has to be satisfied before a person who may be described in any of the ways mentioned in section 2 (g) (iii) can be assessed to sales tax.

When a person acts as an agent of an agriculturist grower and in such capacity sells the produce of the agriculturist, the agent will certainly be liable to be assessed to sales tax if he is a dealer within the meaning of the extended definition of that term in section 2 (g) (iii) of the Madras General Sales Tax Act (I of 1959). The turnover of the agent in such circumstances will be clearly his own turnover and it is not the turnover of the principal. Where, thus, the turnover is that of the agent himself under the statutory definition of dealer given in the Madras General Sales Tax Act (I of 1959), the exemption under the proviso to section 2 (r) can be granted only if the produce in question is grown by the agent himself or grown on a land in which he has an interest, whether as owner, etc. As long as the produce does not satisfy this condition, the benefit of the proviso will not be available to the agent. Further, where the principal himself is only an agriculturist selling his surplus produce and is therefore not a dealer engaged in the business of selling goods the proviso to section 2 (r) will not apply in any event to the transactions of the agent on behalf of such principals.

Petition under section 38 of the Madras General Sales Tax Act, 1959, praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 11th March, 1963 and made in Tax Appeal No. 297 of 1962 against Appeal No. 37 of 1961-62, dated 9th October, 1961 on the file of the Appellate Assistant Commissioner (C.T.), Salem, relating to the assessment year 1959-60. (Assessment No. 3367 of 1959-60, dated 31st March, 1961 on the file of the Commercial Tax Officer, Salem).

G. Ramanujam for Government Pleader (*A. Alagiriswami*), for Petitioner.

Habibullah Badsha and *E. S. Govindan*, for Respondent.

The Order of the Court was made by

Ramakrishnan, J.—This is a revision case filed by the State of Madras against the order of the Sales Tax Appellate Tribunal in Tax Appeal No. 297 of 1962. The assessee is the Tiruchengode Co-operative Marketing Society, and we are told that it has got nearly 15,000 members on its rolls. For the year 1959-60 the taxable turnover of the assessee, as determined by the Commercial Tax Officer, Salem, was Rs. 12,49,000 odd. The assessee appealed to the Appellate Assistant Commissioner, Salem, claiming that a sum of Rs. 12,06,000 odd represented sales of agricultural produce of its members and that those sales were entitled to exemption from assessment under the proviso to section 2 (r) of the Madras General Sales Tax Act, 1959. The Appellate Assistant Commissioner negatived the claim for exemption. The assessee then appealed to the Sales Tax Appellate Tribunal disputing the same turnover on the ground that it was entitled to exemption under the proviso to section 2 (r). In the grounds of appeal to the Appellate Tribunal, the assessee-society contended :—

"We are only acting on behalf of the agriculturist who forms part of the institution and market his produce to his best advantage through the merchants and as such we are not directly undertaking any purchases or sales. We are neither sellers nor purchasers so far as those transactions are concerned. The agriculturist is paid on the spot, while the merchant is allowed credit accommodation, for payment of sale proceeds to the society at a later date. As we are paying in advance the agriculturist on the spot and collect his sale proceeds from the merchants at a later date, the sales turnover effected by the agriculturist-member finds a place in our accounts. They will not in law amount to purchases or sales by us. Thus, the sale proceeds represent actually the amount of sales effected by the agriculturist member and not by us since we are neither purchasers nor sellers in the above transactions."

The Tribunal also, in its judgment, referred to the above grounds of appeal and has given an extract from a typical transaction in which one of the agriculturist-members of the society was concerned, which is illustrative of the transactions making up the disputed turnover. There is a receipt given by the society at the time when the agriculturist brings his produce to the society's godown, and the receipt reads that the sale should not be effected without the consent of the member. The next day, the commodity covered by the receipt was sold to a purchaser and

the agriculturist, who brought the goods to the godown of the society on the previous day, had signed in the bid list relating to the sale of the same produce. The Appellate Tribunal, however, did not determine the nature of the transaction revealed by documents, and in the light of the contentions put forward by the society, namely, that there was no sale by the society at all in the particular cases, but what the society did, in fact, was to secure for the agriculturist-member the most advantageous price for his produce and paid the agriculturist-member on the spot of the sale by auction, the highest price realised by the auction but at the same time it accommodated the merchant, who made the highest bid for the agriculturist's produce, by giving him a loan for the amount of the sale to be debited against him and recovered later on. It has yet to be determined, on a proper appraisal of the data above-mentioned together with the by-laws of the society whether the disputed transactions were really agency sales for the agriculturist effected by the society, or whether they were only transactions where the society helped the agriculturist to get the most advantageous price for his goods and brought him into contact with the buyer who offered the most advantageous price and further paid at the time of the sale full cash payment to the agriculturist, while treating the amount as a loan to the buyer merchant.

The Sales Tax Appellate Tribunal remanded the case for fresh disposal. It dealt with the meaning of the proviso to section 2 (*r*) granting exemption to the proceeds of the sale of agricultural produce, and gave certain directions on this point of law, to be borne in mind by the Appellate Assistant Commissioner, in the disposal of the case afresh after remand. The State of Madras, who have filed this revision before us, challenge the interpretation given by the Tribunal to the proviso and their contention is that this Court should give a proper lead to the assessing authorities in the matter of making assessment in these cases or granting exemption under the proviso to section 2 (*r*).

Section 2 (*r*) reads :

> "Turnover means the aggregate amount for which goods are bought or sold, or supplied or distributed, by a dealer, either directly or through another, on his own account or on account of others whether for cash or for deferred payment or other valuable consideration, provided that the proceeds of the sale by a person of agricultural or horticultural produce, other than tea, grown within the State by himself or on any land in which he has an interest whether as owner, usufructuary mortgagee, tenant or otherwise, shall be excluded from his turnover."

Prima facie, the language of the proviso implies that the person who is entitled to get exemption should be a dealer selling the concerned agricultural produce and that the agricultural produce in question should have been grown within the State by the aforesaid dealer or grown on any land in which the aforesaid dealer has an interest, whether as owner, etc. This aspect of the proviso has been stressed in the Bench decision of this Court in *Kanyakaparameswari Mills* v. *State of Madras*[1] which dealt with section 2 (*i*) of the Madras General Sales Tax Act, 1939, which is in similar terms to section 2 (*r*) of the 1959 Act. At page 828 of the report, the Bench observed :

> "The pronouns 'himself', 'he' and 'his' in the proviso to section 2 (*i*) obviously all refer to a *person* as mentioned in the proviso to section 2 (*i*) *i.e.*, the person who sells the produce grown by himself, or grown on any land in which he has an interest. We have already pointed out that the pronoun 'his' in the expression 'his turnover' can refer only to the dealer. That by itself should be sufficient to hold that all the three pronouns 'himself', 'he' and 'his' in the proviso to section 2 (*i*) also refer to the dealer mentioned earlier in section 2 (*i*)."

The Bench, therefore, held that sales by a producer, that is, by a person who grows agricultural or horticultural produce on his own land or on any land in which he has an interest, will not fall within the scope of section 2 (*i*), unless the producer is also a dealer.

In *Konduri Buchirajalingam* v. *State of Hyderabad*[2], the Supreme Court dealing with an analogous provision, namely, section 2 (*m*) of the Hyderabad General Sales Tax Act, 1950 at page 402, observed :

1. I.L.R. (1955) Mad. 825 : (1955) 1 M.L.J. 169.
2. (1958) 9 S.T.C. 397 (S.C.).

"The main portion of the definition (of dealer) however, shows that 'turnover' only refers to the turnover of a dealer and not of an agriculturist. Therefore, the proviso deals with a person who is both an agriculturist and a dealer and it excludes the proceeds of the sale by him of his own agricultural produce from his turnover as a dealer in goods."

Again, in *K. Satyanarayana & Co.* v. *Sales Tax Officer*[1], the Andhra Pradesh High Court dealing with section 2 (*m*) of the Hyderabad Sales Tax Act, 1950, observed at page 592, that the proviso to section 2 (*m*) implies that the agricultural produce must be grown by the dealer himself or must be grown on land in which he has an interest, whether as owner, etc.

In *Nagarajan* v. *State of Madras*[2], where exemption under section 2 (*i*) of the 1939 Act was sought by a person who sold sugarcane to the Nellikuppam Factory, this Court observed :

"Obviously the exemption for which the proviso to section 2 (*i*) provides comes into play only if the sales are otherwise taxable. The taxability of the sales depends on the question, whether the sales were by a dealer as defined by the Act. A sale even of agricultural or horticultural produce but with nothing more is not enough to establish that the seller is a 'dealer'."

This decision, no doubt, lays down a further test to the application of the proviso that the sale by a person of agricultural or horticultural produce would be exempt only if the sale was by a dealer; not every sale by an agriculturist of his produce would be a sale by a dealer. Such a sale must be, for the purpose of the Sales Tax Act, a sale in the course of business, and where an agriculturist is merely selling produce surplus to his personal requirement that transaction by itself would not be a sale in the course of business. This additional point was stressed by this Court in the above decision.

The learned Government Pleader, appearing for the State, points out that under the definition in section 2 (*g*) (iii) of the 1959 Act, a commission agent, a broker or a *del credere agent*, or an auctioneer or any other mercantile agent, by whatever name called, who carries on the business of buying, selling, supplying or distributing goods on behalf of any principal, will be a dealer. But we had occasion to point in a recent judgment in *Zackria Sons, Ltd.* v. *State of Madras*[3] that the terms used in this section to define a dealer should be applied only after finding out whether in a given case the assessee entered into a bargain with the buyer (or the seller as the case may be) amounting to a sale within the definition of sale in the Act, and that this requirement has to be satisfied before a person, who may be described in any of the ways mentioned in section 2 (*g*) (iii) extracted above, can be assessed to sales tax. Even, on the assumption that the society in the instant case, did transfer property in the goods to the purchaser and for this purpose functioned as an agent of the agriculturist-principal, the further question is whether the society is entitled to get the benefit of the proviso to section 2 (*r*), notwithstanding the fact that it was the principal who raised the agricultural produce and not the society. If the society did in fact function as the agent of the agriculturist-grower and in such capacity sold the produce to the buyer, the society is certainly liable to be assessed to sales tax as dealer in accordance with the extended definition of *dealer* in section 2 (*g*) (iii) of the Act. The turnover of the society, in such circumstances will be clearly its own turnover and it is not the turnover of the principal. This foundation of fact regarding the nature of the society's dealings is implicit in the wider definition of *dealer* given in the 1959 Act, and it must be found to exist before resort can be had to certain decisions referred to by the Tribunal and which were also referred to before us by the learned Counsel for the respondent. We will now refer to these decisions briefly :

India Coffee and Tea Distributing Co., Ltd. v. *State of Madras*[4] dealt with an assessment on the sale of tea. Section 5 (*v*) of the General Sales Tax Act, 1939, had a provision for grant of exemption in the case of sales of tea, which was analogous to section 2 (*i*) of the 1939 Act and section 2 (*r*) of the 1959 Act. That provision stated that the tea sold should have been grown on land in which the seller had one

1. (1958) 9 S.T.C. 591.
2. (1960) 1 M.L.J. 178 : 10 S.T.C. 605, 610.
3. I.L.R. (1965) 1 Mad. 642.
4. (1959) 2 M.L.J. 222 : I.L.R. (1959) Mad. 1056.

of the interests as owner, etc., specified in that section. Some of the sales of the assessee in that case were of the tea grown on the estates of a non-resident principal for whom the assessee acted as agent. In respect of the sales of tea grown by the non-resident principal, the assessee was assessed under section 14-A of 1939 Act. Section 14-A read thus :

> "In the case of any person carrying on the business of buying or selling goods in the Province but residing outside (hereinafter in this section referred to as a non-resident), the provisions of this Act shall apply subject to the following modifications and additions, namely :—
>
> (i) In respect of the business of the non-resident, his agent residing in the State shall be deemed to be the dealer.
>
> (ii) The agent of a non-resident shall be assessed to tax or taxes under this Act at the rate or rates leviable thereunder in respect of the business of such non-resident in which the agent is concerned, irrespective of the amount of the turnover of such business being less than the minimum specified in section 3, sub-section (3).
>
> (iii) Without prejudice to his other rights, any agent of a non-resident who is assessed under this Act in respect of the business of such non-resident may retain out of any moneys payable to the non-resident by the agent, a sum equal to the amount of the tax or taxes assessed on or paid by the agent.
>
> (iv) Where no tax would have been payable by the non-resident in respect of his business in the State by reason of the turnover thereof being less than the minimum specified in section 3, sub-section (3), he shall be entitled to have the amount of the tax or taxes paid by his agent, refunded to him on application made to the assessing authority concerned, or where more than one such authority is concerned, to such of the authorities as may be authorized in this behalf by the Provincial Government by general or special order.
>
> (v) Such application shall be made within twelve months from the end of the year in which payment was made by or on behalf of the non-resident of the tax or taxes or any part thereof."

The learned Judges found, on a strict application of the terms of section 14-A, that in a case where the agent of a non-resident principal resident in the State was assessed to tax under section 14-A, it was really the non-resident principal who was assessed and that the agent was deemed to be a dealer in respect of his business, only as representative for assessment, levy and collection of tax. The very language of section 14-A gave support to this conclusion of the learned Judge. Thus, section 14-A, sub-clause (i), states that the agent by fiction was to be deemed to be a dealer in respect of the *business of the non-resident.* Sub-clause (ii) of section 14-A again referred to the *business* of the *non-resident* in which the agent was concerned, in regard to the levy of tax. Under sub-clause (ii) unlike other dealers, the agent of a non-resident will not be entitled to the exemption on turnovers less than Rs. 10,000 under sub-section (2) of section 3. Sub-clause (iv) to section 14-A provides that if the agent had been assessed, the non-resident principal will be entitled to get exemption for a turnover less than the minimum specified in sub-section (3) of section 3 by an application made for the purpose. These special provisions in section 14-A led the Bench of this Court to hold that in the assessment of an agent under section 14-A, it was the principal's business that was really being brought to levy of tax and that, therefore, in such circumstances, the exemption in regard to the sale by a dealer of tea grown on his own land, would be available for the sales of the non-resident principal. The Court followed an earlier unreported decision in Tax Revision Case Nos. 38 to 40 of 1955, which again referred to the significant points for distinguishing agency transactions under section 14-A from other agencies, and observed :

> "If it is really a vicarious liability that is fastened on the resident agent, the person who really and ultimately has to pay the tax being the non-resident principal, it would be clear that the turnover in the hands of the agent, who is by statutory fiction deemed to be the dealer, cannot be held to include what is statutorily exempted from the computation of that turnover."

The Tribunal in the instant case was of the opinion that these observations in Tax Revision Cases Nos. 38 to 40 of 1955 would also apply to the present case, even though it did not deal with the agent of an non-resident principal selling the principal's goods and which sales are brought to assessment under the special provisions of section 14-A. In fact the present case falls under the 1959 Act, which

does not reproduce section 14-A at all. On the other hand, it has amplified the definition of *dealer* in the manner already referred to. Therefore, an agent with dominion over the goods of the principal and with authority to transfer the property in such goods and consequently effect sales and acquire a turnover in respect of such transactions, cannot be treated on the same footing as the agent of a non-resident principal assessed under section 14-A. The turnover acquired by the agent in the circumstances mentioned above is, in law as well as in fact, his own turnover for the purposes of sale tax assessment, and it cannot be considered as the principal's turnover. Where the turnover is that of the agent himself under the statutory definition of *dealer* given in the 1959 Act, the exemption under the proviso to section 2 (*r*) can be granted only if the produce in question is grown by the agent himself or grown on a land in which he has an interest, whether as a owner, etc. As long as the produce does not satisfy this condition, the benefit of the proviso will not be available to the agent. There is also the further point mentioned by a Bench of this Court in *Nagarajan* v. *State of Madras*[1] that where the principal himself is only agriculturist selling his surplus produce and is, therefore, not a dealer engaged in the business of selling goods the proviso to section 2 (*r*) will not apply in any event to the transactions of the agent on behalf of such principals.

Reference was made in the course of the arguments by the learned Counsel for the respondent to section 8 of the 1939 Act. The first proviso to section 8 states that in the case of a transaction of sale by a grower of produce grown by him or on his land, the exemption under section 8 shall not be given unless the amount for which the goods concerned in such transactions were sold were included in the turnover of the principal, or would have been so included but for an exemption provided under the Act. Under section 8, licensed dealers would be exempt from assessment to sales tax in respect of transactions effected by them, on behalf of their principals in accordance with the terms and conditions of the licence. The proviso implies that they would get the benefit of exemption in regard to sales of agricultural produce only if those sales are included in the turnover of the principals. But here again, there will be a difficulty in cases where the principals are agriculturists and not dealers and consequently in whose turnover the sales of agricultural produce by the agents could not be included. This apart, section 8 does not find place in the 1959 Act, and we are not called upon, therefore, to consider the meaning or effect of section 8 in the present case.

We have already referred to the fact that neither the Sales Tax Appellate Tribunal nor the lower assessing authorities have considered the real nature of the transactions between the members of the society and the society and whether the society has functioned in the present case actually as a dealer of the goods of the constituent members or whether the society has only played the part of an intermediary bringing the agriculturist and the prospective buyer together at an auction which is held in the presence of the agriculturists and who approves the sale effected to the buyer. The society in its grounds of appeal has strenuously contended that its part is not that of a selling agent but only of an intermediary between the grower and the buyer merchant. This question has to be decided after a careful analysis is made of the bargain between the members of the society on the one hand and the society on the other in regard to the disputed turnover. The relevant by-laws of the society also may have to be looked into for a correct appreciation of the position.

Therefore, while maintaining the order of remand by the Sales Tax Appellate Tribunal to the Appellate Assistant Commissioner for a more detailed examination of the case and fresh disposal, we set aside the observations of the Tribunal in regard to the scope of the proviso to section 2 (*r*) and the manner in which the benefit of the exemption under that proviso can be availed of by a dealer including an agent, who is a dealer as provided in the definition in section 2 (*g*) (iii) of the General

1. (1960) 1 M.L.J. 178 : 10 S.T.C. 605.

Sales Tax Act, 1959. The Appellate Assistant Commissioner will dispose of the case in the light of the remarks we have set down above.

The appeal is ordered in the above terms but, in the circumstances, there will be no order as to costs.

V.K. — *Order accordingly.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

PL. CT. PL. Palaniappa Chettiar .. *Petitioner* *

v.

A. RM. A. L. A. Muthu Veerappa Chettiar and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 73 and Order 21, rule 57 (as amended in Madras State)—Rateable distribution under section 73—When can be claimed—Execution petition dismissed with the endorsement, "petition dismissed. Attachment to continue"—Petition if should be deemed to be pending for the purpose of claiming rateable distribution.

Section 73 of the Civil Procedure Code (V of 1908) is intended to provide expeditious, summary and cheap remedy for the execution of money decrees held against the same judgment-debtor by several persons, the claim of rival decree-holders getting adjusted without the necessity for separate proceedings. Section 73 entitles a decree-holder to rateable distribution, if the following conditions are satisfied : (*a*) the applicant for rateable distribution must have obtained his decree and applied for execution of the decree to the appropriate Court ; (*b*) the application should have been made prior to, and must be a subsisting and pending one at the time of the receipt of the assets by the Court ; (*c*) the assets of which rateable distribution is claimed must be assets held by the Court ; (*d*) the attaching creditor as well as the decree-holder claiming to participate in the assets should be holders of decrees for the payment of money and (*e*) the decrees should have been obtained against the same judgment-debtor.

Where after an execution petition filed by a decree-holder (petitioner) against the judgment-debtor was dismissed with the following endorsement thereon : "Petition dismissed. Attachment to continue for four months", and before the expiry of the aforesaid four months period the attached properties were sold in execution of another decree obtained by a third person against the same judgment-debtor and the proceeds of the sale were brought into Court :

Held, the execution petition of the petitioner must, notwithstanding the above order of dismissal, be deemed to be pending when the proceeds of the sale were received by the Court and therefore the petitioner would be entitled to claim rateable distribution under section 73 of the Civil Procedure Code in the proceeds realised by the Court.

It has been repeatedly observed by the Madras High Court that the actual words used do not govern the matter as to the character of the disposal and that the decision as to the nature of the disposal must eventually turn on the construction of the order passed in the light of the circumstances under which the order was passed and its legal effect.

Order 21, rule 57 (1) of the Civil Procedure Code (V of 1908), as amended in the Madras State, makes it imperative that when an execution petition is dismissed for default the order shall state that attachment do cease. Hence when the attachment is directed to be continued it should be held the the Court saw no such default on the part of the decree-holder as warranted the termination of the execution as a penalty for default with the result that the execution petition of the petitioner in the instant case must be deemed to have been pending at the material date when the assets were realised by the Court.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Devakottai, dated 28th March, 1962 and made in E.A. No. 66 of 1962 in E.P. No. 89 of 1961 in O.S. No. 31 of 1959.

E. A. Viswanathan, for Petitioner.

K. Sankara Sastry, for Respondents.

The Court made the following

ORDER.—This is a revision under section 115 of the Civil Procedure Code, from an order dismissing the petitioner's application for rateable distribution under section 73 of the Civil Procedure Code.

* C.R.P. No. 1487 of 1962. 14th July, 1965.

Though the petitioner can pursue his claim by way of a suit, as this revision petition has been pending in this Court from 1962, and the question for decision is a simple one, it not being disputed that the matter would otherwise come under section 115 of the Civil Procedure Code, the faintly put forward preliminary objection is overruled.

The petitioner obtained a decree against the defendant in O.S. No. 44 of 1959 on the file of the Subordinate Judge's Court, Coimbatore, and for the realisation of a sum of about Rs. 79,264 due under the decree he had the decree transferred to the Subordinate Judge's Court, Devakottai, for execution, and filed therein, E.P. No. 25 of 1960 on 2nd February, 1960 for attachment and sale of certain immovable properties. Attachment was ordered on 5th February, 1960, and order for sale was made on 19th July, 1960, the properties to be proclaimed and sold on 5th September, 1960. It is seen from the records of execution that there was no sale, and subsequently on 5th July, 1961, on application the upset price was reduced, and the properties were directed to be proclaimed and sold on 4th September, 1961. There were no bidders even at this sale, and the properties were not sold ; and on 7th September, 1961 the execution petition was adjourned to 14th September, 1961 for steps. On 14th September, 1961 with the endorsement "petition not yet filed" the matter was adjourned to 20th September, 1961. On 20th September, 1961 the execution petition was dismissed with the following endorsement thereon : "No petition filed. Petition dismissed. Attachment to continue for four months". Meanwhile, the properties were attached in execution of another decree against the same judgment-debtors in E.P. No. 89 of 1961 in O.S. No. 31 of 1959, on the file of the Subordinate Judge's Court, Devakottai, and the properties were sold on 18th December, 1961, for Rs. 5,000, and the proceeds brought into Court. It is the claim of the petitioner by E.A. No. 66 of 1962 to share rateably with the proceeds thus brought in, that has been rejected on the ground that there was no subsisting execution pending, when assets were realised. It should be noted that in terms of the order dated 20th September, 1961, directing continuance of the attachment for four months, the properties sold continued under the attachment at the instance of the petitioner also, the attachment being valid upto 20th January, 1962. The sale in E.P. No. 89 of 1961, which brought in proceeds into Court, was pending this attachment.

The petitioner contended in the lower Court, on the basis of a decision of this Court in *Krishnaswamy Iyengar* v. *Vedavalli Ammal*[1], that the very fact of the attachment being continued established that the order of dismissal of his execution petition was an order for statistical purposes, and in fact and in law it must be deemed to be pending when proceeds were brought into Court. This contention did not find acceptance the lower Court placing reliance on a decision of the Nagpur High Court in *Gulab Chand* v. *Dongarmal*[2]. The lower Court has taken the view that the dismissal of the petitioner's execution petition was one for default on the part of the decree-holder and that there was a termination of the execution petition filed by him, despite the continuance of the attachment. In my view this runs against the current of decisions of this Court. So far as the decision of the Nagpur High Court in *Gulabchand* v. *Dhongarmal*[2], is concerned it would be apparent from a perusal of it, that the decision rested on the wording of Order 21, rule 57 of the Civil Procedure Code, as amended by that Court in 1930. Referring to the decision of some other High Courts that had been cited, Pollock, J., observes thus in that case :—

"Several decisions of other Courts have been cited, showing that such order may be an order of adjournment, but none of these decisions is precisely in point, partly because the wording was different and partly because all these decisions were decided under Order 21, rule 57, as it was originally enacted."

I do not find any reference in the judgment of Pollock, J., to anything like the imperative provision found in Order 21, rule 57, as amended in this State, providing that, when the Court dismisses an application by reason of the decree-holder's default,

1. A.I.R. 1959 Mad. 218.
2. A.I.R. 1936 Nag. 277.

the order shall state that the attachment do cease. The decision of the Nagpur High Court in *Gulab Chand* v. *Dongarmal*[1], cannot be of any help to the present case, as that case was decided on the rule applicable there, and on the facts of the case.

Section 73 of the Civil Procedure Code, is intended to provide expeditious summary and cheap remedy for the execution of money decrees held against the same judgment-debtor by several persons, the claim of rival decree-holders getting adjusted without the necessity for separate proceedings. Section 73 provides that, where assets are held by a Court, and more persons than one have, before receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor, and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons.

Section 73 entitles a decree-holder to rateable distribution, if the following conditions are satisfied :

> "(*a*) the applicant for rateable distribution must have obtained his decree and applied for execution of the decree to the appropriate Court ;
>
> (*b*) the application should have been made prior to the receipt of the assets by the Court ;
>
> (*c*) the assets of which rateable distribution is claimed must be assets held by the Court ;
>
> (*d*) the attaching creditor as well as the decree-holder claiming to participate in the asset should be holders of decrees for the payment of money ; and
>
> (*e*) the decrees should have been obtained against the same judgment-debtor."

Though section 73 speaks of only an application to the Court for execution before the receipt of such assets, it has been held in more than one case that the application must be a subsisting and pending one at the time of receipt of assets. In this case, the question is whether, notwithstanding the wording of the order dismissing the petitioner's execution application, it could still be pending, the order of dismissal in effect amounting to an order adjourning it *sine die*. It has been repeatedly observed by this Court that the actual words used do not govern the matters as to the character of the disposal, and that the decision as to the nature of the disposal must eventually turn on the construction of the order passed, in the light of the circumstances under which the order was passed, and its legal effect. What has to be determined is what is the import of the order, what was in that intended and what was expressed by the Court, when statedly dismissing the petition, while continuing the attachment ? When construing this order one has to bear in mind Order 21, rule 57 as it stands amended in this State. Order 21, rule 57 (1) runs thus :

> "Where any property has been attached in execution of a decree and the Court hearing the execution application either dismisses it or adjourns the proceedings to a future date it shall state whether the attachment continues or ceases :
>
> Provided that when the Court dismisses such an application by reason of the decree-holder' default the order shall state that the attachment do cease."

The requirement for an order terminating the attachment, when the dismissal of the application is on the decree-holder's default, is mandatory.

No doubt, in the order in question it is observed, "No petition filed. Petition dismissed". What this petition is, it is not made clear. Already the upset price had been reduced once. The lower Court observes that it was open to the petitioner to file a petition to reduce the upset price or to state the properties may be proclaimed for sale on the same upset price. The upset price having been reduced once, if the decree-holder does not choose to apply for reduction of the upset price still further for want of bidders on the reduced upset price, that cannnot be said to amount to default on the part of the decree-holder. At this stage the correctness of the order on the execution petition is not open to challenge. This Court has only to interpret the order, and when one finds the Court continuing the attachment, the proper interpretation would be that the execution petition itself is not being terminated, but adjourned for the nonce. We cannot readily agree that the Court intended passing

1. A.I.R. 1936 Nag. 277.

a patently illegal order. The decision of this Court in *Krishnaswamy Iyengar* v. *Vedavalli Ammal*[1], placed before the lower Court, in my view, directly covers the case. That was also a revision arising out of an order under section 73 of the Civil Procedure Code. The order on the execution petition, which came up for construction, ran thus :—" E.P. dismissed as not pressed. Attachment to continue for six months from to-day". With reference to this endorsement on the execution petition, this Court observed that non-prosecution of the execution application conveyed by the term " not pressed " would not necessarily mean a default of the kind contemplated under rule 57. Reference was made therein to the decision of Basheer Ahmed Sayeed, J., in *Govinda Padayachi* v. *Kannammal*[2], wherein it was observed at page 205 :

> "If the Court had intended that the execution petition should be treated as dismissed for default and that the proceedings should terminate finally, it would have felt bound to order that the attachment was also to cease. But the Court exercised its discretion actually the other way."

In *Krishnaswamy Iyengar* v. *Vedavalli*[1], Ramachandra Iyer, J., (as he then was) has observed, at page 219 :

> " It is well settled that the mere use of words ' closed, dismissed or struck off' do not indicate default on the part of the decree-holder and that question has to be determined only on the facts and circumstances of each case."

In my view, in the light of the authorities, when the attachment is directed to be continued, it should be held that the Court saw no such default on the part of the decree-holder as warranted the termination of the execution as a penalty for default. It must therefore be held on the facts and circumstances above set out that there had been no valid final termination of the proceedings in execution and that the execution petition must be deemed to be pending on the material date, when the assets were received by the Court.

The result would be that the petitioner will be entiled to a share in the assets realised under section 73 of the Civil Procedure Code. The Civil Revision Petition is, therefore, allowed, the order dated 28th March, 1962, on E.A. No. 66 of 1962 is set aside, and the application of the petitioner to share rateably is remanded to the lower Court for passing appropriate orders. No order as to costs.

V.K. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice.*

K.N. Sreenivasan .. *Petitioner**

v.

P.V. Subramaniam .. *Respondent.*

Execution—Decree on promissory note against first defendant and against second defendant as guarantor—Execution—Procedure.

On a decree on a negotiable instrument the maker alone will be liable. But where the decree is against another person also as guarantor, the decree must be treated as separate decrees and the plaintiff has first to proceed in execution against the maker of the negotiable instrument and only if that execution fails the decree may be executed against the guarantor.

A plea of misjoinder of causes of action cannot be permitted to be raised for the first time in revision against decree of Full Bench of Court of Small Causes, Madras in New Trial Application.

Petition under section 115 of Act V of 1908 praying the High Court to revise, the decree of the Court of Small Causes (F.B.) Madras dated 2nd April, 1962 and passed in N.T.A. No. 450 of 1961 against S.C.S. No. 1307/61 on the file of the Chief Judge, Court of Small Causes, Madras.

G. K. Damodara Row and *T. R. Thyagarajan*, for petitioner.

S. Kothandarama Nayanar, for Respondent.

The Court made the following

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1. A.I.R. 1959 Mad. 218.
2. (1957) 1 M.L.J. 201.

* C.R.P. No. 1727 of 1962. 27th August, 1965.

ORDER.—The main point involved in this revision proceeding is a simple one and covered by authority. The Plaintiff (respondent) instituted the suit upon a negotiable instrument, against the maker, namely, the first defendant, employed as a clerk in the Indian Bank, Ltd. The second defendant is the brother of the first defendant, and an Advocate of this Court. In paragraph 3 of the plaint, the plaintiff stated, that he lent the amount on 26th February, 1958, to the first defendant, and that the first defendant executed a promissory note for cash consideration. At that time, the second defendant put forth an oral guarantee to the plaintiff, that the amount will be duly repaid by the first defendant, and that he stood as guarantor for repayment. This was no part of the terms of the negotiable instrument itself Admittedly, on the instrument, the maker alone is liable, and the second defendant, the revision petitioner, has figured in the document as merely an attestor in respect of execution.

The plaintiff filed the suit against both the defendants. He sued the maker (first defendant) for the balance of the amount due, and wanted a decree against the second defendant an guarantor. The Trial Court decreed the suit as prayed for, and the second defendant went before the New Trial Bench, which confirmed that decree. Hence the present revision.

Obviously, there is some confusion about the frame of the suit, and it exhibits a misjoinder of causes of action. If it is to be regarded as a suit *simpliciter* on a negotiable instrument, the second defendant might have been quite an important witness, but he was not liable for the suit claim under the law. That has been laid down in several decisions, stemming from *S. Janaki Das* v. *Sri Kishen Pershad*[1]. The Judicial Committee laid it down explicitly :

> "These sections (sections 26, 27 and 28 of the Negotiable Instruments Act) contain nothing to support the contention, which is contrary to all established rules, that in an action on a bill of exchange or promissory note against a person whose name properly appears as a party to the instrument, it is open either by way of claim or defence to show that the signatory was in reality acting for an undisclosed principal."

In *Mahadebram* v. *Jagannath*[2], a Bench of the Patna High Court reaffirmed the proposition of law, and held that no person was liable on a hundi or bill of exchange unless his name appears on the instrument as a party liable.

Learned Counsel for the plaintiff (respondent) contends that the plea of misjoinder of causes of action was never advanced by the revision petitioner. I find on a scrutiny of the record, that this is correct. I cannot now permit the revision petitioner to succeed on a plea, which he has not chosen to put forward at any stage of the present proceedings so far. But it is equally clear that, strictly in law, with reference to a decree on the negotiable instrument as such, the maker alone would be liable. The present decree therefore really falls into two parts, first a decree on the instrument against the maker (first defendant), and the second, a separate decree on the debt against the guaranter. I therefore direct, allowing the revision to this limited extent, that it now be incorporated as part of the decree that the decree should be executed against the maker (first defendant) for the suit claim, and that, only if that execution fails, should further execution proceed against the second defendant, as guarantor. The revision is otherwise dismissed. The parties will bear their own costs.

With regard to the deposit of Rs. 500 already made by the revision petitioner as a condition for stay, in response to a direction of this Court, this will be kept in further deposit for a term of two months from this date, to enable the plaintiff to proceed against the first defendant, the person primarily responsible, by way of execution. If that execution fails, the decree may be executed against the second defendant, and this amount may then be taken by the decree-holder in satisfaction of the suit claim.

K. S. ——— *Revision allowed in part; Decree modified.*

1. 36 M.L.J. 429 : L.R. 46 I.A. 33 : I.L.R. 46 Cal. 663 (P.C.) at 669.
2. A.I.R. 1942 Pat. 337.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. VEERASWAMI AND MR. JUSTICE T. VENKATADRI.

Sri Arthanari Transports (P.) Ltd. and others .. *Appellants**

v.

K.P. Swami Goundar and others .. *Respondents.*

Company—Formation—Suit by plaintiffs for declaration of directorship, participation and management—Subscribing to Memorandum of Association—What constitutes—Failure to sign the declaration appended to the Memorandum and non-specification of shares to be taken—Signatories not subscribers to the Memorandum—Directors—First appointment by the subscribers to the Memorandum—Subject only to such directors acquiring the requisite qualifications.

Companies Act, 1956 (*Central Act I of* 1956), *sections* 12, 13, 14 *and* 270, 271.

The plaintiffs and defendants wanted to form a transport company and a 'proposal form' with all the names and signed by all of them was taken to Madras by some of the defendants for registration of the company. On the Registrar of Companies raising an objection to the name of the company, the name of the company was changed, and the last page of the Memorandum of Association and articles of association containing the declarations were signed by the defendants only after inserting the changed name, and registration obtained. The plaintiffs filed the suit against the company and the other defendants, for a declaration that they continued to be directors of the company and for an injunction restraining the defendants and enabling the plaintiffs to exercise their office of directorship and participate in the management.

Held :—The plaintiffs actually and in law were not subscribers to the Memorandum of Association.

Section 12 of the Act relating to the mode of forming incorporated companies enacts that two or more persons associated for any lawful purpose may form a private company by subscribing their names to a Memorandum of Association and otherwise complying with the requirements of the Act in respect of registration. A Memorandum of Association of a company is required by section 14 to be, where it is a private company, in the form prescribed in Table B, in Schedule I and the declaration under section 14 of the Act embodies two matters on which the signatories thereto agree, (1) they, that is, the several members whose names and addresses are subscribed desire to form themselves into a company in pursuance of the memorandum and (2) they agree respectively to take the number of shares in the capital of the company set opposite to their names.

It is plain that those who do not subscribe their signatures to the declaration in token of the desire to form themselves into a company and do not agree to take shares as required in the declaration, cannot be considered to be subscribers to the Memorandum of Association. If persons have signed all the pages of the Memorandum but have not signed the declaration, they would not be complying with the statutory requirements and would not be subscribers to the Memorandum of Association.

Under section 13 of the Act no subscriber to the Memorandum shall take less than one share and each subscriber of the Memorandum shall write opposite to his name the number of shares he takes.

The conclusiveness of the certificate of registration under section 35 would not avail to cure these defects.

The fact that the Articles of Association simultaneously registered with the Memorandum, by one of its clauses mentions such persons among the first directors would not be of assistance, because what governs is the Memorandum of Association and the fact of the persons' enumeration in the Articles as among the first directors will not make *ipso facto* subscribers to the Memorandum.

Even if the plaintiff were subscribers to the Memorandum and they subscribed for a share, still under section 270 and 271 of the Act, they must acquire the qualifications requisite for a director. (Under the Articles of the Company a director should have fifty shares). No, doubt under Regulation 64 of the Regulations for Management of a company limited by shares in Table A of Schedule I to the Act, the number of the directors and the names of the first directors shall be determined in writing by the subscribers of the memorandum or a majority of them. But this is subject to the condition that they should acquire the qualifications requisite for a director.

Appeal against the decree of the Court of the (Principal) District Munsif, Coimbatore, dated 5th November, 1960, in Original Suit No. 337 of 1960.

G. Ramaswamy and *S.M. Subramanian*, for Appellant.

A. Sundaram Ayyar, *N. Sivamani* and *N. Narayanaswami*, for Respondents 1 to 4.

John and *Row*, for Respondents 6 and 7.

The Judgment of the Court was delivered by

Veeraswami, J.—Defendants 1 to 3 and 8 have appealed from the Judgment of the District Munsif of Coimbatore for the plaintiffs declaring that they continued to be Directors of Sri Arthanari Transports (Private) Limited, the 1st defendant,

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* Appeal No. 224 of 1962. 23rd April, 1965.

and restraining the defendants from preventing them from exercising their office of directorship and participating in the management of the Company. The appeal was originally filed in the Court of the Subordinate Judge at Coimbatore, but by an order of this Court on the company side it stood transferred to this Court. Though the appeal was valued at Rs. 800 in the first instance, on an application by the appellants, the appeal has been placed before a Division Bench on a view that the value of the subject-matter exceeded Rs. 7,500 under Chapter 10, Rule 1, Clause 3 (*d*) of the Appellate Side Rules.

The main question in the appeal is whether the District Munsif was right in his view that the plaintiffs were subscribers to the Memorandum of Association of the 1st defendant and were among the members of its first Board of Directors. The 1st defendant was registered as a Company on 16th February, 1959. Its registered office was to be in the State of Madras and its primary object was to carry on transport business. It has a share capital of Rs. 1,00,000 divided into thousand shares of Rs. 100 each. The qualification of a director under the Articles would be the holding of at least fifty shares of the Company. The plaintiff's case is that they and defendants 2 to 8 had agreed to take fifty shares each for becoming directors and subscribed to the Memorandum of Articles of Association which were registered. The plaintiffs were thus appointed along with defendants 2 to 8 as directors of the Company and the fact was mentioned in the Articles themselves. They are entitled to hold office in that capacity for life and are neither removable, nor do they retire. As directors named in the Articles of Association, there was no allotment as such made in their favour. The plaintiffs paid Rs. 101 each towards the shares at the inception and tendered the balance of share money for their shares. The 2nd defendant, the Managing Director was improperly evading to receive the same. At no time did they state that they were unwilling to be directors; nor were they called upon by the 1st defendant by notice as required by law, to remit the share money due from them. It was however made out that by resolution of the General Body dated 5th March, 1959, the plaintiffs were removed from directorship in accordance with their own wishes, while in point of fact the plaintiffs never expressed any such desire either orally or in writing. To the knowledge of the plaintiffs, no meeting of the Board of Directors had been held for allotment of the balance of shares they had taken and though they understood that the General Body Meeting of the shareholders had been called for on 19th March, 1960, they had not received any notice of it. The plaintiffs continue to be directors and the declaration sent by the 1st defendant to the Registrar of Companies that the plaintiffs had ceased to be directors as they desired to be removed and for non-payment of the minimum qualification of directors share value, was improper. The defendants had no right to remove the plaintiffs from their directorship and the communication to the Registrar of Companies was illegal, fraudulent and *ultra vires* the powers of the Company. On these averments, the plaintiffs prayed for a declaration that they continued to be directors of the 1st defendant-company and for an injunction restraining the defendants and enabling the plaintiffs to exercise their office of directorship and participate in the management of the Company.

The 2nd defendant filed a written statement which defendants 1, 3 and 8 have adopted. The rest of the defendants filed separate written statements supporting the plaintiffs. According to the 2nd defendant, the plaintiffs, and defendants 2 to 8 no doubt wanted to form a Transport Company under the name and style of "Thirumurugan Transport Limited." A 'proposal form' with the names of all the plaintiffs and defendants 2 to 8 signed by all of them was taken to Madras by the defendants 3 and 4 on 8th February, 1959 for registration of the company. But as there was objection from the Registrar to the name "Thirumurugan" it was changed into "Arthanari Transport Private Limited." The application with the changed name was signed duly by defendants 3 and 4 and it is therefore not true that the plaintiffs signed the Memorandum of Articles of Association. But about 16th February, 1959, the 1st plaintiff did not want to be in the company with the changed name. In fact he floated another Company under the name of "Vijayalakshmi Transports Private Ltd." Meanwhile plaintiffs 2 to 4 along

with the 1st plaintiff expressed their unwillingness to continue in the company, did not pay any money and withdrew. They gave a letter of consent withdrawing themselves which was left with the 4th defendant but he has colluded with the plaintiffs and suppressed the same. On the strength of this withdrawal, the plaintiffs were removed from directorship on 5th March, 1959, and the fact was notified to the Registrar of Companies on 9th March, 1959. The 2nd defendant denied that the plaintiffs had paid Rs. 101 each and maintained that the plaintiffs never acquired the status of directors, that they had abandoned the idea of continuing as directors of the company and that, in any case they had been validly removed and had acquiesced in it. The 2nd defendant added that after the 1st defendant-company were registered, it applied for a stage carriage permit on the route Coimbatore to Vellore which was granted to it on 23rd November, 1959. The 1st plaintiff who got his own company Vijayalakshmi Transports Limited, registered on 16th February, 1959, when the 1st defendant was registered, applied for and competed with the 1st defendant in getting the above permit; and frustrated by his defeas he colluded with the 4th defendant along with plaintiffs 2 to 4 and instituted the suit.

The District Munsiff settled five issues on these pleadings and his main findings are all in favour of the plaintiffs, namely, that the plaintiffs must be deemed to be subscribers to the Memorandum and Articles of Association of the 1st defendant, that they were therefore shareholders as well as first directors, that they had not been validly removed from their office by the resolution dated 5th March, 1959, and that though the plaintiffs had not proved that each of them had subscribed Rs. 101 even before the formation of the company, they as well as defendants 2 to 8 constituted the first directors of the Company on the clear understanding that each of them would contribute fifty qualification shares but no date had been fixed for payment of the money and at no time the 1st defendant called upon the plaintiffs to pay for the shares. The District Munsif therefore held that it was futile on the part of defendants 1 to 3 and 8 to contend that no shares were allotted to the plaintiffs because they had not formally applied for the same as defendants 2 to 8 had. There was a further finding by him that it was not proved that the plaintiffs had at any time expressed their unwillingness to continue as directors of the Company.

Mr. V.K. Thiruvenkatachari for the appellants does not dispute that the intention of all the parties before and at the time of the registration of the 1st defendant-Company was that they should all be members of the 1st defendant and constitute its first directors. In fact the evidence for the defendant contains admissions to that effect. The 2nd defendant deposed:

> "We accepted the plaintiffs 1 to 4 as the directors and obtained their signatures; we only thought of changing the name of the company and not the directors. Even at the time of the registration we had no idea of changing the directors. The plaintiffs were the directors of the company until they gave their letters of registration."

Nevertheless the contention for the appellants is that whatever was the intention of the parties, the plaintiffs never in law became members of the 1st defendant and did not, as a matter of fact, subscribe to the Memorandum and Articles of Association as registered. In any case, say the appellants, the plaintiffs failed to acquire the requisite share qualification to continue as directors. It may be seen that these submissions made before us are somewhat different from those addressed to the Court below. The basis for the first contention is this. At the bottom of each of the pages except the last one in the printed Memorandum of Association and Articles of Association, the plaintiffs as well as defendants 2 to 8 had each duly signed. It is also seen that the 1st defendant's name as changed has been printed and pasted over the original name in the printed Memorndum and Articles of Association. The last sheet in the Memorandum as well as the Articles relates to the actual subscription to the Association and contains the columns as to serial number of the subscribers, their names, addresses, occupations and descriptions, number of shares taken by each subscriber and name, address, description and occupation of witness. In the last page in the Memorandum is the declaration followed by the above columns. Only defendants 3 and 4 had subscribed their signature to the declaration and indicated that each of them had subscribed for fifty shares. Their signatures

were attested by a single witness. The position is identical in the last page of the printed Articles. With reference to these facts, the argument for the appellants is that the subscribers to the declaration to form themselves into a Company and the agreement to take the requisite number of shares in the capital of the Company to qualify themselvs as directors were only defendants 3 and 4 and that being the case, the plaintiffs who never subscribed to the declaration and signed in token of their desire to form themselves into a company, agreeing to take the requisite number of shares cannot be regarded in law as subscribers to the Memorandum of Association and that therefore they never acquired the status of members or directors of the Company. It is said that the fact that the plaintiffs had signed at the bottom of each of the other pages in the Memorandum and Articles could make no difference to this position. The fact that defendants 3 and 4 only happened to sign the declaration in the Memorandum as well as the Articles before registration appears to be an accident for it was only on the Registrar of the Companies raising an objection to the original name to the company that, it would appear, defendants 3 and 4, in consultation with the 2nd the defendant, decided to alter the name to Sri Arthanari Transports Private Ltd., and that this apparently led defendants 3 and 4 to remove the last sheet in the Memorandum as well as the Article and substitute fresh sheets containing the declaration and the columns. As defendants 3 and 4 alone were deputed to Madras for getting the Company Registrered, they subscribed to the Memorandum and Articles which satisfied the requirement of the minimum number of persons who should join to form a private company. This change of situation obviously occurred in spite of the intention of the plaintiffs and defendants 2 to 8 together to form the Company and be its members and first directors.

Section 12 of the Indian Companies Act, 1956 relates to the mode of forming incorporated companies and says that two or more persons associated for any lawful purpose may form a private Company by subscribing their name to a memorandum of association and otherwise complying with the requirements of the Act in respect of registration. It is important to note that "subscribing their names to a Memorandum of Association" implies an agreement between the persons concerned to associate each other into a body corporate and subscribing in the context means the signing by such persons or their nominees in the Memorandum in token of their agreement to so associate themselves. The signatories are thus parties to the agreement which is in the form of a declaration. A memorandum of association of a company is required by section 14 to be, where it is a a private company in the form prescribedd in Table B, in Schedule I. This form, after providing for the name of the company, the place of its registered office its objects, limited liability of its members and share capital contains, at the end a declaration :

> "We, the several persons whose names and addresses are subscribed are desirous of being formed into a company in pursuance of this Memorandum of Association and we respectively agree to take the number of shares in the capital of the company set opposite our respective names."

Then follow the columns relating to the names, addresses, descriptions and occupations of subscribers and the number of shares taken by each subscriber. At the very last comes the column "witness to the above signatures." The declaration in that form obviously embodies two matters on which the signatories thereto agree, (1) they, that is, the several members whose names and addresses are subscribed, desire to form themselves into a Company in pursuance of the Memorandum and (2) they agree respectively to take the number of shares in the capital of the company set opposite to their respective names. It is plain that those who do not subscribe their signatures to the declaration in token of their desire to form themselves into a company and do not agree to take shares as required in the declaration, cannot be considered to be subscribers to the Memorandum of Association. Section 13 mentions the requirements with respect to a Memorandum and two of them are that no subscriber to the Memorandum shall take less than one share and each subscriber of the Memorandum shall write opposite to his name the number of the shares he takes. Not only the plaintiffs have not subscribed to the declaration but they have not also complied with the last requisite relating to their writing opposite to their names the number of shares they take as subscribers. It is true that by sub-section

(1) of section 41, subscribers of the Memornadum of a company shall be deemed to have agreed to become members of the company and on its registration, shall be entered as members in its register of members. But that will be the case only if the plaintiffs were subscribers of the Memorandum and subscription to a Memorandum of Association means not merely signing at every one of its pages but signing their names in token of entering into an agreement both as to the signatories forming themselves into a company but also their undertaking to take the number of shares indicated against their names. We do not think that from the plaintiffs' signatures elsewhere in the Memorandum than in token of their being parties to a declaration as to the formation of the association and undertaking to accept the number of shares mentioned, they can be regarded as subscribers to the Memorandum of Association, for, they are not by their signatures parties to the declaration which is the vital part of the Memorandum. We are aware that a certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of the Act have been complied with in respect of registration and matters precedent to or incidental thereto. But the conclusiveness engendered by section 35 does not cover the defect in this case and require that those who have not been parties to the declaration in the Memorandum should nevertheless be regarded as subscribers thereto. It is also true that the Articles of Association simultaneously registered with the Memorandum of Association by one of its clauses mention the plaintiffs as among the first directors. But in our view, this again is not of assistance to the plaintiffs because what governs is the Memorandum of Association and the fact of the plaintiffs' enumeration in the Articles as among the first directors will not make them *ipso facto*, subscribers to the Memorandum. We hold that the plaintiffs actually and in law were not subscribers to the Memorandum. That will suffice to dispose of the appeal.

Even on the alternative contention for the appellants, they should as we think succeed. Assuming that the plaintiffs were subscribers to the Memorandum and it may be deemed that each of them had subscribed for a share, they have not complied with section 270. Under the Articles a director should have fifty shares to qualify himself. Section 271 requires that if a director is not already so qualified on his appointment he must obtain his qualification within two months thereafter. No doubt under Regulation 64 of the Regulations for Management of a Company limited by shares in Table A of Schedule I to the Act, the number of the directors and the names of the first directors shall be determined in writing by the subscribers of the Memorandum or a majority of them. Apparently this explains how the plaintiffs found a place is the Articles as among the first directors. But this is subject to the condition that they should acquire the qualification requisite for a director. The plaintiffs do not appear to have applied for the requisite shares to acquire the qualifications and this is evident from the proceedings of the Company's General Body Meeting on 19th February, 1959. The plaintiffs have not stated that they applied at any subsequent date or remitted the required amount for fifty shares. The effect of the evidence on record is that the plaintiffs took or evinced no active interest in the 1st defendant company right through until it succeeded in getting a stage carriage permit.

The appeal is allowed and the suit is dismissed with costs throughout.

V.S. *Suit dismissed.*

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IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

Messrs. Calcutta Dyeing and Bleaching Works, Madras .. *Petitioner**

v.

The State of Madras, represented by the Joint Commercial Tax Officer, Godown Division .. *Respondent.*

Madras General Sales Tax Act (I of 1959), sections 2 (d) and 2 (g)—Customs Department selling confiscated goods—If " dealer "—Assessee purchasing such goods assessable at the point of first sale and selling them—If can claim exemption from sales tax on the ground that his was not the first sale.

It cannot be held that the Customs Department which comes into possession of confiscated goods from time to time and periodically sells them in auction is engaged in trade, commerce or manufacture or adventure in the nature of trade and consequently cannot be considered as being engaged in " business " as defined in the Madras General Sales Tax Act. The Customs Department selling confiscated goods will not therefore be a *dealer* within the meaning of section 2 (*g*) of the Madras General Sales Tax Act (I of 1959).

Where therefore an assessee purchases camphor, which is assessable under the Madras General Sales Tax Act at the point of first sale by a dealer, sold by the Customs Department when it auctioned confiscated goods and subsequently sells the same, it is the assessee who will be liable to be assessed to sales tax as dealer effecting the first sale and not the Customs Department.

Petition under section 38 of Madras Act 1 of 1959, praying the High Court to revise the Order of the Sales Tax Appellate Tribunal, Madras, dated 23rd December, 1963, and made in Tax Appeal No. 542 of 1963, against the order in Appeal No. 305/62-63, dated 12th March, 1963, on the file of the Appellate Assistant Commissioner (C.T.), Madras (Madras General Sales Tax, 702/1961-62, dated 21st November, 1962, Joint Commercial Tax Officer, Godown Division, Madras).

C. S. Chandrasekara Sastri, for Petitioner.

The Order of the Court was made by

Ramakrishnan, J.—The assessee purchased camphor sold by the Customs Department when they auctioned confiscated goods. He subsequently sold the camphor. Camphor is assessable at the point of first sale by dealer. The assessee contended that the Customs Authority was the first dealer. But the Department repelled that contention and holding that the Customs Authority's sales were not the first sales, assessed the assessee as the first dealer in camphor. This order was confirmed by the Sales Tax Appellate Tribunal. The assessee now seeks revision against the above order.

The learned Counsel appearing for the petitioner argued that these sales effected by the Customs Department are regular and periodic. He also referred to a recent decision of this Court reported in *Faiz Ahmed & Co.* v. *State of Madras*[1] where this Court observed

" That there is something to be said for the view that the absence of profit motive does not mean that a business is not being carried on."

Nevertheless stress was laid upon the activity in which the dealer was concerned being one of a business nature, so as to attract to him the technical definition of *dealer* in section 2 (*g*) of the Madras General Sales Tax Act, 1959. The definition of dealer again hinges on the definition of *business* which, according to section 2 (*d*) of the Act, includes any trade, commerce or manufacture or an adventure or concern in the nature of trade, commerce or manufacture whether or not any profit accrues from the said trade, commerce, manufacture or concern. It cannot be held that the Customs Authority which comes into possession of confiscated goods from time to time and periodically sells them in auction is engaged in trade, commerce or manufacture or adventure in the nature of trade. We have got similar instances, say of a Magistrate's Court where periodically unclaimed property concerned in offences accumulate and whose sales are advertised and held. The properties

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*T.C. No. 160 of 1964. 20th July, 1964.

1. (1964) 15 S.T.C. 201, 204.

which accumulate in the possession of the Customs Department usually consist of a random collection of goods spotted at the customs barrier, and detained, and subsequently not delivered to the importer for one reason or other. The Customs Department cannot be considered as being engaged in business as defined in the Act when sales of such goods after their confiscation are held. Even assuming for the sake of argument that a profit motive is not an essential feature of the transaction, and that there is some kind of regularity in the sales effected by the Customs Department, still in the absence of anything to indicate the essential requirement of an activity in the nature of trade, commerce or manufacture or adventure or concern in the nature of trade, we are unable to see how the decision of the lower Tribunal can be held to be incorrect. This revision case is dismissed.

V.K. — *Revision Case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

C. Ramachandran .. *Petitioner* *

v.

M. Kasim Khaleeli .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), section 14 (1) (b)—Eviction of tenant under on the ground that building is bona fide *required for demolition—Requirements—Dilapidated condition of building and total demolition—Necessity—Mere demand of higher rent—If can negative* bona fides *of the landlord requiring for demolition.*

Section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960) confers the right on the landlord to get the tenant evicted if he *bona fide* requires the building for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished. It is not necessary that the building should be very old and decrepit to enable the landlord to claim that his immediate purpose was for demolition of the building. All that the sub-section requires is that the building should be *bona fide* required for the immediate purpose of demolishing it, with a view to erecting a new building. If these conditions are satisfied the landlord is entitled to ask for eviction. The demolition intended need not be total. Where the roof of a premises is to be demolished and a staircase put retaining only the walls, that would amount to demolition within the meaning of section 14 (1) (*b*).

The mere demand of higher rent could not negative the *bona fides* of the landlord.

Petition under section 25 (i) (*a*) (ii) of the Madras Act XVIII of 1960 praying the High Court to revise the order of the Court of Small Causes (Third Judge), Madras, dated 24th September, 1963, and made in House Rent Appeal No. 758 of 1962, House Rent Case No. 1241 of 1962, Rent Controller, Madras.

O. Radhakrishnan and *C. B. Venkataswami*, for Petitioner.

S. V. B. Rao and *G. V. V. Gopalaswamy*, for Respondent.

The Court made the following

ORDER.—The tenant whose eviction was ordered by the Rent Controller and confirmed by the Court of Small Causes, Madras, is the petitioner in this petition. The landlord filed a petition for eviction of the petitioner from the fourth shop in premises No. 19-C, Woods Road, Mount Road, Madras, on grounds of wilful default in payment of rent from September, 1961 to March, 1962 and for demolition and reconstruction. We are not concerned in this petition with the ground of wilful default in payment of rent. The petitioner submitted that the petition for eviction was not *bona fide*, that it was filed because he refused to pay the higher rent demanded by the landlord and that the landlord had no intention of demolishing the building for the purpose of constructing a new building.

The Rent Controller on the evidence came to the conclusion that the landlord *bona fide* required the building for the immediate purpose of demolishing it with a view to erect a new building on the site. He also found that the intention of the landlord was to remove the roof of the building retaining the side walls and that

* C.R.P. No. 2093 of 1963. 22nd July, 1964.

would amount to demolition within the meaning of section 14 (1) (*b*) of the Madras Buildings (Lease and Rent Control) Act, 1960. The Rent Controller also considered a notice given by the landlord (Exhibit R-1) demanding higher rent and held that the mere demand of higher rent could not negative the *bona fides* of the landlord.

On appeal, the Third Judge, Court of Small Causes, Madras, confirmed the findings of the Rent Controller and held that the landlord *bona fide* required the building for the immediate purpose of demolishing if for erecting a new building. He found that the application was *bona fide*.

In this petition, Mr. Radhakrishnan, learned Counsel for the petitioner, submitted that the orders of the lower Courts are not sustainable as they failed to take into consideration the material circumstances. He submitted that the Small Cause Judge failed to take note of Exhibit R-1, the notice of the landlord demanding higher rent from the petitioner, and that if the lower appellate Court had taken into account that notice, it would have come to the conclusion that the landlord had no *bona fides*. The lower appellate Court had taken into consideration the evidence in the case and came to the conclusion that the landlord had proposed to demolish the material portion of the building for the purpose of putting up a new structure. The lower appellate Court was also satisfied that the shop occupied by the petitioner had to be demolished for the purpose of constructing a new building. It is not disputed that the landlord had submitted plans and applied to the Corporation for sanction for putting up a staircase and upstairs above the rooms occupied by other tenants. The fact that the landlord demanded twice the rent by Exhibit R-1 would not make any difference in the conclusion arrived at by the lower appellate Court.

Mr. Radhakrishnan next contended that on the evidence all that was proposed was to demolish the roof of the premises in the occupation of the petitioner retaining the two walls and this would not amount to demolition under section 14 (1) (*b*) of the Act. According to him, the demolition should be total. In support of his contention, he relied on a number of decisions. In *P. E. Cadle & Co.* v. *Jacmarch Properties*[1] it was held that the landlords' opposition failed since the word *reconstruct* in section 39 (1) (*f*) of the Act of 1954 meant *rebuild* and the landlords had not proved an intention to rebuild the whole or a substantial part of the premises comprised in the holding (*viz.* the ground floor and basement), and an intention to effect a change of identity without a physical reconstruction (*viz.*, such a change as would be caused by combining the three floors of the premises into a larger whole by erecting internal staircases) was not enough. In that case, the tenants were in occupation of the ground floor and basement for the purpose of carrying on business as tobacconists and hairdressers—the front portion was used as a tobacconist's shop and the back portion was used as a men's hairdressers. To get down to the basement they had to go outside the front door of the shop and down some steps into the basement. It was found that the landlord intended to make the three floors into one self-contained unit and to put inner staircases from the ground floor shop down to the basement, and from the ground floor shop up to the first floor. The landlords also intended to put lavatories on the first floor with all the necessary plumbing. They also intended to make the basement a much better place by putting in a proper floor and doing away with the damp. The County Court Judge, who tried the case, held that the work intended by the landlords did not amount to reconstruction. The decision is not of much help in deciding this case, as the Court was construing the word *reconstruction*. Moreover, on the facts of the case it is not clear as to what the landlord proposed to do with the premises occupied by the tenant. The learned Counsel also relied on the judgment of Hodson, L. J., where he held that the word *demolish* could clearly involve the physical act of destruction. The learned Counsel would construe it as to mean

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1. (1957) 1 All E.R. 148.

total destruction of the entire premises. I do not find any warrant for such construction.

The learned Counsel relied on a decision reported in *Nela Ram* v. *Jiwan Lal*[1] and submitted that the fact that the building was not in a dilapidated condition should be taken into consideration for negativing the *bona fides* of the landlord. This decision does not in any way support the contentions of the learned Counsel. In that case the Rent Controller as well as the appellate Court held taking into consideration the various facts, that the landlord did not require the building for the purpose of demolishing for constructing a new building. The Supreme Court held that the revision Court was in error in intereferring with the finding of facts. In the present case, on the other hand, the Rent Controller as well as the lower appellate Court, taking into consideration all the facts, came to the conclusion that the landlord *bona fide* required the building for immediate demolition. The learned Counsel also relied on a recent decision of this Court reported in *Mohsin Bhai* v. *Hale & Co., Madras*[2]. On the strength of the decision the learned Counsel sought to argue that when the building is not old or decrepit the *bona fides* of the landlord has to be ruled out. The learned Judge has not laid down that in the case of a building which is not old and decrepit the landlord cannot *bona fide* require it for demolishing for the purpose of erecting a new building. The learned Judge has no doubt stated that such applications, in the case of a building in sound condition, may be made with the ulterior purpose of evicting the tenant. Section 14 (1) (*b*) confers the right on the landlord to get the tenant evicted if he *bona fide* requires the building for the immediate purpose of demolishing it and if such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, it is not necessary that the building should be very old and decrepit to enable the landlord to claim that his immediate purpose was for demolition of the building. All that the sub-section requires is that the building should be *bona fide* required for the immediate purpose of demolishing it, with a view to erecting a new building. If these conditions are satisfied, the landlord is entitled to ask for eviction. The contention of the learned Counsel that the demolition, intended, should be total is not supported by any authority. In this case the roof of the premises that is in the occupation of the petitioner is to be demolished and a staircase put retaining only the walls. This in my opinion, would amount to demolition. All the contentions of the learned Counsel for the petitioner fail.

The Civil Revision Petition is dismissed with costs.

V.K. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE OF MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

D. Sreenivasappa .. *Petitioner**

v.

The State of Madras represented by the Assistant Commercial Tax Officer IV, South Madras and Chingleput .. *Respondent.*

Madras General Sales Tax Act (I of 1959), section 16—Assessment of escaped turnover under—If can be made on an estimate to the best of judgment.

The contention that when a question of assessment of escaped turnover under section 16 of the Madras General Sales Tax Act (I of 1959) arises there is no scope for making an assessment to the best of judgment, is untenable. Where a finding has been arrived at that the turnover of an assessee pertaining to a certain period has escaped assessment and that no accounts have been maintained by the assessee from which exact estimate of the turnover that has thus escaped is possible, the provision for making an estimate to the best of judgment is automatically attracted. The rule as to best judgment assessment is no doubt stated precisely in section 12. But it is implicit also in section 16.

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1. (1962) 2 S.C.J. 270. 2. (1964) 2 M.L.J. 147.

* T.C. No. 32 of 1963. 24th June, 1964.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K.S. RAMAMURTI.

Messers. Calcutta Dyeing and Bleaching Works, Madras .. *Petitioner* *

v.

The State of Madras, represented by the Joint Commercial Tax Officer, Godown Division .. *Respondent.*

Madras General Sales Tax Act (I of 1959), sections 2 (d) and 2 (g)—Customs Department selling confiscated goods—If "dealer"—Assessee purchasing such goods assessable at the point of first sale and selling them—If can claim exemption from sales tax on the ground that his was not the first sale.

It cannot be held that the customs Department which comes into possession of confiscated goods from time to time and periodically sells them in auction is engaged in trade, commerce or manufacture or adventure in the nature of trade and consequently cannot be considered as being engaged in "business" as defined in the Madras General Sales Tax Act. The Customs Department selling confiscated goods will not therefore be a *dealer* within the meaning of section 2 (g) of the Madras General Sales Tax Act (I of 1959).

Where therefore an assessee purchases camphor, which is assessable under the Madras General Sales Tax Act at the point of first sale by a dealer, sold by the Customs Department when it auctioned confiscated goods and subsequently sells the same, it is the assessee who will be liable to be assessed to sales tax as dealer effecting the first sale and not the Customs Department.

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C. S. Chandrasekara Sastri, for Petitioner.

The Order of the Court was made by

Ramakrishnan, J.—The assessee purchased camphor sold by the Customs Department when they auction confiscated goods. He subsequently sold the camphor. Camphor is assessable at the point of first sale by dealer. The assessee contended that the Customs Authority was the first dealer. But the Department repelled that contention and holding that the Customs Authority's sales were not the first sales, assessed the assessee as the first dealer in camphor. This order was confirmed by the Sales Tax Appellate Tribunal. The assessee now seeks revision against the above order.

The learned Counsel appearing for the petitioner argued that these sales effected by the Customs Department are regular and periodic. He also referred to a recent decision of this Court reported in *Faiz Ahmed & Co.* v. *State of Madras*[1] where this Court observed

"That there is something to be said for the view that the absence of profit motive does not mean that a business is not being carried on."

Nevertheless stress was laid upon the activity in which the dealer was concerned being one of a business nature, so as to attract to him the technical definition of *dealer* in section 2 (g) of the Madras General Sales Tax Act, 1959. The definition of dealer again hinges on the definition of *business* which, according to section 2 (d) of the Act, includes any trade, commerce or manufacture or an adventure or concern in the nature of trade, commerce or manufacture whether or not any profit accrues from the said trade, commerce, manufacture or concern. It cannot be held

* T.C.No. 160 of 1964. 20th July, 1964.

1. (1964) 15 S.T.C. 201, 204.

that the Customs Authority which comes into possession of confiscated goods from time to time and periodically sells them in auction is engaged in trade, commerce or manufacture or adventure in the nature of trade. We have got similar instances, say of a Magistrate's Court where periodically unclaimed property concerned in offences accumulate and whose sales are advertised and held. The properties which accumulate in the possession of the Customs Department usually consist of a random collection of goods spotted at the customs barrier, and detained, and subsequently not delivered to the importer for one reason or other. The Customs Department cannot be considered as being engaged in business as defined in the Act when sales of such goods after their confiscation are held. Even assuming for the sake of argument that a profit motive is not an essential feature of the transaction, and that there is some kind of regularity in the sales effected by the Customs Department, still in the absence of anything to indicate the essential requirement of an activity in the nature of trade, commerce or manufacture or adventure or concern in the nature of trade, we are unable to see how the decision of the lower Tribunal can be held to be incorrect. This Revision Case is dismissed.

V.K. *Revision Case dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

The Madurai Municipality through its Commissioner at Tallakulam, Madurai .. *Petitioner**

v.

M/s. The Indian Textile Paper Tube Co., Ltd., through their Managing Agents Messrs. A. & F. Harvey, Ltd., holding their Office at Pandian Building, West Veli Street, Madurai .. *Respondent.*

Madras District Municipalities Act (V of 1920), section 93 and Schedule IV, rules 17 and 18—Profession tax on companies—When could be levied.

Rule 18 of Schedule IV of the District Municipalities Act which provides the mode of determining the profession tax payable by a company carrying on business partly within the jurisdiction of a Municipality and partly outside it. The levy in such cases is a percentage of the turnover in the area of the Municipality in question. In order to determine the turnover in the area of a Municipality either goods must be produced, manufactured, purchased or sold within that area. Where it is found that none of these operations are carried on within the limits of a Municipality the Municipality has no right to levy and collect any professional tax merely on the footing that the company has an office within its limits and under rule 17 of Schedule IV it should be deemed to have transacted business in that area.

Petition under section 25 of Act (IX of 1887), praying the High Court to revise the Decree of the Court of the Subordinate Judge (II Additional), Madurai, dated 25th January, 1962 and passed in S.C.S. No. 152 of 1961.

A. Alagiriswamy (Government Pleader) and *V. Ramaswami*, for Petitioner.

King & Partridge, for Respondent.

The Court made the following

ORDER.—This Revision has been filed by the Madurai Municipality against the decree of the Court of the Subordinate Judge, Madurai, on a Small Cause

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* C.R.P. No. 1674 of 1962. 19ht July, 1965.

Suit instituted by the respondent company for refund of profession tax for seven half-years on the basis that the tax had been collected illegally, that is, the Municipality was not entitled to levy the tax in the circumstances, pleaded.

The brief facts are: The plaintiff is a limited company registered under the Indian Companies Act and doing business in the manufacture and sale of paper cones and tubes of various descriptions. The Company's factory is situate in Virudhunagar, Ramanathapuram District. The manufacture of goods by the Company is done at Virudhunagar. All contracts are entered at Virudhunagar and all sales, etc., are made at Virudhunagar. But the plaintiff-Company's affairs are managed by their agents Messrs. A. & F. Harvey Company, Limited, Madurai and the registered Office of the plaintiff Company is situated within Madurai Municipal Limits. The plaintiff contended that though the Head Office of the Company was situated within the Municipal limits of Madurai, it had not been transacting any business in Madurai and therefore the levy of profession tax for the seven half-years was *ultra vires*, the contention of the 'plaintiff being that the levy was not in accordance with or in conformity with the provisions of the Madras District Municipalities Act and the Rules framed thereunder. The Court below on the evidence which was unrebutted found that the plaintiff did not transact any business as such within the limits of the Madurai Municipality.

Under section 93 of the Madras District Municipalities Act (Madras Act V of 1920) if the Council by a resolution determines that a profession tax shall be levied, then every company which, after the date specified in the notification published under section 80, transacts business in the Municipality for not less than sixty days in the aggregate in any half-year shall pay a half-yearly tax assessed in accordance with the rules in Schedule IV, of the Act. Rule 17 of Schedule IV provides thus:

"A company or person shall be deemed to have transacted business and a person shall be deemed to have exercised a profession, art or calling or held an appointment within a municipality if such company or person has an office or place of employment within such municipality."

Now by virtue of this deeming provision it can be held in this case that the company is transacting business within the Municipal limits as required under section 93. But the fact remains that the company is actually transacting business in Virudhunagar in Ramanathapuram District. In a case of this kind where a company can be held to be transacting business in more than one area basis for levy of profession tax is provided for under rule 18 of Schedule IV. Rule 18 runs thus:

"(1) Where a company or person transacts any business other than money-lending in any half-year exclusively in the area of a single municipality, the income of such company or person from the transaction of such business shall for the purpose of levying profession tax under this Act during the half-year, be deemed to be—

(a) where income-tax is assessed on such company or person under the Indian Income-tax Act, 1922 for the year comprising the half-year, one half of the amount at which the profits and gains of such business are computed under section 10 of the Indian Income-tax Act, 1922, for the purpose of assessing the income-tax; and

(b) where the amount of the said profits and gains is not ascertainable or where such company or person is not assessed to income-tax, such percentage or percentages as the (State Government) may subject to the approval of both Houses of the State Legislature determine, of the turnover of such business transacted in the area of the municipality during the half-year or where this is also unascertainable during the corresponding half-year of the previous year.

(2) Where a company or person transacts any business other than money-lending partly in the area of a municipality and partly outside such area, the income of such company or person from the transaction of such business in the area of the municipality shall, for the purpose of levying profession tax under this Act be deemed to be the percentage referred to in clause (b) of sub-rule (1) of the turnover of such business transacted in such area during half-year or the corresponding half-year of the previous year, as the case may be."

It will be seen that the levy shall be a percentage of the turnover in the area in question. Admittedly in this case and it is a finding on unrebutted evidence there is no turnover in the business within the limits of Madurai Municipality. It is only by virtue of the deeming provision in rule 17 that the company has to be treated as transacting business within Madurai Municipal limits. Sub-clause (3) of rule 18 itself defines turnover and makes the position clear. It runs thus:

"18. (3) For the purposes of clause (b) of sub-rule (1) and sub-rule (2) the turnover of business in municipality means the aggregate money value of the goods produced, manufactured, purchased or sold or of any other business except money-lending transacted in such municipality.".

For a turnover to be found in the area of the Municipality either goods must be produced or manufactured or purchased or sold. It is not contended that any of these operations relating to the business is carried on within Madurai Municipal limits. The lower Court has in this view held and rightly that the Municipality had no right to levy and realise the tax for the seven half-years in question, and decreed the suit as prayed for.

Learned Counsel appearing for the Government Pleader raises a point that the suit does not lie in the Small Cause Court. It is stated that there must be a declaration and a suit for declaratory relief is not cognisable by a Court of Small Causes. I do not think there is any necessity for a relief of declaration in this case. The suit is for recovery of the monies which have been illegally collected and once the plaintiff establishes that the levy is illegal, he is entitled to a decree. The need for a finding as to the illegality of the levy before refund could be claimed will not make the suit one of the kind contemplated in section 42 of the Specific Relief Act. Besides, no point as to the maintainability of the suit was taken in the lower Court. The result is that this Revision Petition fails and is dismissed with costs.

R.M. — *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE M. NATESAN.

Mohamed Shareef Sahib and another .. *Petitioners**

v.

Abdul Rahiman Sahib .. *Respondent.*

Practice—Suit by an endorsee of a promissory note which is insufficiently stamped—Endorsee if can maintain the suit as an assignee of the debt—Tests to determine nature of claim

Negotiable instruments—Endorsement of—If assignment of debts.

Though no particular form is required for transfer of a debt, there is a vital distinction between the transfer of a debt in a promissory note and the transfer of the promissory note itself. If there is an assignment of the debt, the assignment will have to be duly stamped under the Stamp Act. No doubt the Court will liberally interpret an endorsement so as not to defeat a *bona fide* assignee of his rights. A mere transfer or endorsement of a promissory note will not carry with it a right of action on the debt.

Where the actual endorsement on the promissory note reads that it is made over for consideration, the suit can be maintained only on the promissory note and if the promissory note is insufficiently stamped it has to fail.

Petition under section 25 of Act (IX of 1887) praying the High Court to revise the Decree of the Court of the District Munsif, Vriddhachalam dated 13th July, 1962 and passed in S.C.S. No. 237 of 1962.

V. Krishnan and *P. Veeraraghavan*, for Petitioner.

T. V. Balakrishnan and *N. Vanchinathan*, for Respondent.

The Court made the following

ORDER.—This Revision has been filed by the defendants against whom a decree had been passed in a Small Cause Suit. The claim was made against them for recovery of a sum of Rs. 349-50, the principal and interest, due on an insufficiently stamped promissory note dated 14th February, 1959, executed by them in favour of one Jaina Bibi. The plaintiff claims to be an assignee of the promissory note and it being insufficiently stamped, wants to rest his claim as a transferee of the debt. The main defence is that there is no specific transfer of the debt as such as a chose in action.

Though no doubt no particular form is required for transfer of a debt, still when there is an endorsement the Court has to construe it to find out whether in fact what

* C.R.P. No. 1682 of 1962. 19th July, 1965.

is transferred is the debt or the promissory note alone. There is a vital distinction between the transfer of a debt and the transfer of the promissory note and a suit on the debt differs in substance from a suit on the promissory note. If there is an assignment of the debt the assignment will have to be duly stamped under the Indian Stamp Act. This is a matter which the Court can bear in mind in interpreting whether the endorsement is in reality a transfer of the debt. No doubt, the Court will liberally interpret the endorsement so as not to defeat a *bona fide* assignee of his rights. In the present case it is conceded that the borrowing was in the morning and the promissory note was executed in the evening. But for this it would be impossible to maintain even a suit on the debt, the promissory note being insufficiently stamped. Learned Counsel appearing for the petitioners, defendants contends that this is another factor which the Court may have to bear in mind in interpreting whether the transfer was of the debt or of the promissory note. Now, construing the actual language of the endorsement which speaks of the promissory note being made over, in the light of these circumstances, one cannot but come to the conclusion that what was done on the occasion of the endorsement was an assignment of the promissory note for consideration. The suit is therefore maintainable only as one on the promissory note and then the suit on the promissory note has to fail, the note not being properly stamped.

It was pointed out to the lower Court for the defendants, that a mere transfer or endorsement of the promissory note will not carry with it a right of action on the debt and the decision of this Court in *Maruthamuthu Naicker* v. *Kadir Badsha Rowther*[1] was relied on. The learned District Munsif has attempted to distinguish this case in a manner which I am unable to understand. He observes that the Full Bench decision cited above related to a promissory note which was executed by the manager of a joint Hindu family and the endorsee sought to make the other members of the family liable. I fail to see what distinction from the principle of the case the learned District Munsif finds as to the law applicable in the present case. It is observed at page 576 in the above decision :

"Where the indorsement is in blank it only operates to transfer the property in the instrument and not as an assignment of the debt, as was pointed out by Madhavan Nair, J., in *Periakaruppan Chetti* v. *Mottayya Mudali*[2]. An endorsement may operate to assign the debt as well when it is so worded and the requirements of the law with regard to stamping are complied with, but unless there is an endorsement of this nature the indorsee has rights merely on the instrument ...."

The language of the endorsement in this case does not give any room for doubt that what was assigned was only the property in the promissory note and not the debt *de hors* the promissory note. The Revision has therefore to succeed and the suit is dismissed. In the circumstances there will be no costs in this Court or in the Court below.

R.M. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICAURTE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

S. Sheik Mohamed Maracair .. *Petitioner**

v.

K.T. Mohamed Ibrahim Ummal and another .. *Respondents.*

Madras Court-fees and Suits Valuation Act (XIV of 1955), section 69—Refund of half the court-fee—Suit settled out of Court but parties insisting on a memo. of compromise being recorded—If refund of court-fee could be claimed.

Section 69 of the Court-fees Act does not provide for a refund of court-fees where a compromise is got decreed by the Court. Refund is provided for only in cases where the suit is got dismissed as settled out of Court.

1. (1938) 1 M.L.J. 378: I.L.R. (1938) Mad. 568 (F.B.).
2. (1934) 69 M.L.J. 30 : 41 L.W. 177.

* C.R P. No. 1374 of 1965. 23rd July, 1965.

Where in a case the parties have filed a memorandum of compromise under which the suit is withdrawn as settled and the Court is called upon to record the compromise and a decree has been directed by the Court in terms of the compromise in so far as they related to the suit, it is not a case of a mere settlement out of Court attracting the provisions of section 69 of the Court-fees Act. But where a suit is in fact settled out of Court and is dismissed as such, merely because a memo. is put into Court setting out the terms of settlement, the party may not be deprived of the benefit of the section.

Quaere—Where in a suit the defendants are set *ex parte* and *ex parte* evidence has been recorded but later the *ex parte* decree is set aside and the suit is ultimately reported settled out of Court can refund of court-fee be ordered under section 69 of the Act ?

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the City Civil Judge (VII Assistant), Madras, dated 19th September, 1961 and made in O.S. No. 3047 of 1959.

V. Ratnam, for Petitioner.

K. Gopalaswami for the Government Pleader, on behalf of State.

The Court made the following

ORDER.—This is a Petition by the plaintiff against the order of the Court below, holding that the plaintiff will not be entitled to a refund of half the court-fee paid on the suit claim. The suit was on the basis of a mortgage by deposit of title deeds. It is found from the records that on an earlier occasion the suit had been decreed *ex parte*. Then the plaintiff had also been examined as a witness, and documents Exhibits A-1 to A-17, were marked in evidence. Later the *ex parte* decree was set aside, and, the defendants entering appearances, issues were framed and the case was getting adjourned for trial. Before the case was taken up for disposal on merits as contest, a memorandum of compromise was filed in Court, and with reference to this the endorsement on the plaint by the plaintiff's Counsel runs thus :

"Compromise memo. has been filed. It may be recorded. The suit is reported settled out of Court. Half the court-fee paid on the plaint may be refunded to the plaintiff."

The memo. of compromise, which is in the usual form of memos. of compromise filed in Courts, refers to the plaintiff having received, on the day in question, Rs. 10,000 in cash from one Sheik Abdul Khadar, on behalf of defendants 1 and 2 in full settlement of the claims between them. There is a clause there that, in view of the said settlement between the plaintiff and the defendants, the suit shall be withdrawn by the plaintiff as settled out of Court. There are other provisions about stamp papers, which had been handed over to plaintiff by the defendants, so that they might get refund. There is an embargo against the plaintiff using those stamp papers for any other purpose, except for getting a refund. The compromise provides that the defendants will in no way be responsible and liable, if the plaintiff was not able to get refund of the stamps. When the case was taken up the parties did not stop with merely filing this memo. into Court and intimating to the Court that the case was withdrawn as the matter had been settled out of Court and praying that the suit might be dismissed. The Counsel for the plaintiff wanted the compromise petition to be recorded while reporting settlement out of Court and insisted on the compromise being specifically recorded. The learned VII Assistant Judge, City Civil Court, before whom the matter came, observed in the judgment passed on the occasion, that from the insistence of the defendant's Counsel it was obvious that the Court was required to set its seal of approval on the arrangement, by recording the compromise. The Court observed that the arrangement could not be recorded as a mere report to Court that the suit had been settled out of Court. The actual order of Court was for recording the compromise, a decree to be drawn up in terms of the compromise in so far as it related to the subject-matter of the suit. In these circumstances, the learned City Civil Judge held that the plaintiff would not be entitled to refund of half the court-fee paid on the suit claim.

Learned Counsel appearing for the petitioner contends that all that section 69 of the Madras Court-fees Act, 1955, required was a dismissal of the suit as settled out of Court before any evidence has been recorded on the merits of the claim, and that as it was the ultimate result of the compromise in this case he would be entitled to refund of half the court-fee. It is pointed out that, in the decree as drafted, there

is a clause regarding the withdrawal of the suit as settled out of Court. But there is another clause also in the decree relating to documents. In this case, the parties were not satisfied with merely getting the suit dismissed, but wanted the compromise to be recorded by the Court. It is quite apparent that the parties wanted not merely a dismissal of the suit as settled out of Court, but a record by the Court of the satisfaction of the plaintiff's claim. A settlement out of Court may contain executory agreements. The settlement might still keep the claim outstanding. Here, what the parties wanted was a record by the Court that the claim had been settled and satisfied. In fact, there is no prayer in the compromise for dismissal of the suit as settled, though there is a provision for the withdrawal of the suit as settled out of Court. Standing by itself, the suit would be dismissed though they have not asked for a dismissal of the suit as settled out of Court. But, when the matter came up before the Court the plaintiff's Counsel wanted the compromise to be recorded and the Counsel for the defendants insisted upon a decree in terms of the compromise. In fact, the matter has been proceeded with under Order 23, rule 3 of the Civil Procedure Code. The language of section 69 of the Court-fees Act does not provide for a refund of court-fee, where a compromise is got decreed by the Court. Refund is provided for, only in cases where the suit is got dismissed as settled out of Court.

Learned Counsel submits that merely because a memo. is put into Court, setting out the terms of the settlement, when the suit is ultimately dismissed as settled out of Court the plaintiff should not be deprived of the benefit of the provision of section 69. But that is, unfortunately, not the case here. When the parties desire to report settlement of a case to Court, and pray for the dismissal, they might, and Counsel might as a matter of caution insist upon a memo. being filed in Court to that effect. The memo. may even contain the terms of the settlement but the prayer to Court is for dismissal of the suit as settled. Getting the terms also recorded is a quite different thing. While seeking a record of a compromise and the terms of the settlement, if a term is first put into the memo. to the effect that the suit is settled out of Court and is being withdrawn, it looks like a camouflage, for the purpose of getting refund of court-fee, the other terms of the compromise and the prayer in Court for recording the terms being inconsistent with a plain decree of dismissal of the suit. The learned City Civil Judge has set out exactly as to what had happened in Court and what was required of the Court on the memo. of compromise. The Court was asked to record the compromise, and a decree has been directed by the Court in terms of the compromise in so far as they related to the suit. The submission to Court was not for recording the suit as settled out of Court. I do not think that, in the circumstances, the Court below could be said to have erred in refusing to direct refund of half the court-fee, in terms of section 69 of the Madras Court-fees and Suits Valuation Act, 1955.

In the view I take the memo. of comrpomise and the proceedings thereon, it is unnecessary to consider whether merely recording of evidence on the merits at an earlier stage of the suit, when the defendants had not even entered appearance, but were set *ex parte*, will, by itself, debar the plaintiff from claiming refund of half the court-fee, if later, the suit is got dismissed as settled out of Court.

The Revision fails and is dismissed. No costs.

R.M. *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

V. Adikesavel Naidu .. *Petitioner**

v.

V. K. R. Krishnaswami Mudaliar and another .. *Respondents.*

Limitation Act (IX of 1908), section 19—Undated endorsement in acknowledgment of liability—Reliance upon to save limitation—Oral evidence as to date of acknowledgment—Onus of proof.

It is no doubt true that in cases where there is an acknowledgment of liability in writing but the date is not specified oral evidence may be given of the date when such acknowledgment was made. It is for the plaintiff to make out that his claim is within time and it is for him to let in evidence to show that the acknowledgment was made within three years of the original date or the date of any subsequent acknowledgments. There is no presumption that in the absence of any evidence as to the exact date of the endorsement, it should be taken as made within three years of the prior endorsement.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Kancheepuram, dated 30th January, 1962 and passed in S.C.S. No. 586 of 1961.

T. V. Balakrishnan and *N. Vanchinathan*, for Petitioner.

A. Seshachari, V. Janakiraman and *V. Gajapathy*, for Respondent.

The Court made the following

ORDER.—This Revision is by the defendant against whom a decree has been passed in a Small Cause Suit for recovery of money due on a promissory note. The promissory note is for a sum of Rs. 210 dated 5th September, 1953. There is an endorsement thereon dated 20th July, 1955 whereunder Rs. 23 had been paid. There is no dispute about this endorsement. The next endorsement bears no date. It is stated to have been made in July, 1958 and thereunder Rs. 27 has been paid. The defendant repudiated the very factum of endorsement. He questioned its genuineness. The lower Court has found against the plea of the defendant that he did not make the second endorsement, and has decreed the suit presuming that the second endorsement must have been made in time.

Learned Counsel appearing for the defendant contends that it will not be sufficient to establish that a second endorsement has been made. It is submitted that it must be established further by evidence that it was made within three years after the first endorsement bearing the date 20th July, 1955. The endorsement in question purports to have been made in July, 1958 and no date is given. Learned Counsel draws my attention to the second sub-clause of section 19 of the Limitation Act which provides :

> "Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed."

The learned Counsel points out that there is absolutely no evidence as to the date of this endorsement. The first plaintiff as P.W. 1 has not spoken about it, and there has been no suggestion to the defendant or his witness in cross-examination as to the date of the endorsement. The learned District Munsif observes that in the absence of evidence on the side of the defendants as to exactly when the endorsement was made the presumption must be that it was made within three years, of the date of the first endorsement. It must be noted that it is for the plaintiff to make out that his claim is within time. The date of the first endorsement is known. The second endorsement is made in July, 1958. Unless the second endorsement was made within 20th July, 1958, it will not help the plaintiff. It is for him therefore to make out that the second endorsement had been made within time. Under section 19 (2) oral evidence can be let in as to the date of the endorsement and it will be for the plaintiff to let in such evidence as they can as to the date of the endorsement. As already pointed out there has not even been a suggestion to the defendant and his witness in cross-examination as to when the second endorsement came to be made even leaving out the plaintiff's evidence.

* C.R.P. No. 1094 of 1962. 23rd July, 1965.

Learned Counsel for the plaintiffs contends that the case of the defendant was one of denial of the endorsement and he did not say that it was not made within time. There is little force in this argument. The defendant has specifically pleaded hat the claim is barred by limitation. No doubt the trial Court has held on the evidence that the second endorsement is a genuine one. But it has not found on evidence that the endorsement was made within time. Its decision is based on a legal presumption which has no basis in law. I do not find room for any such presumption under the Negotiable Instruments Act, the only relevant presumption provided being that the endorsements were made in the order in which they appear on the negotiable instrument. This presumption cannot help the plaintiffs.

In the result the suit has to fail and the revision succeed. The revision is accordingly allowed. No order as to costs. The suit is dismissed but no costs to the defendant.

R.M. ——— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

A. K. Sundaram .. *Petitioner**

v.

Government of India, through its Secretary, Communications Department, Secretariat, New Delhi .. *Respondent.*

Civil Procedure Code (*V of* 1908), *Order* 44, *rule* 1, *clause* (2)—*Leave to appeal* in forma pauperis—*Order rejecting application and directing payment of court-fee without giving a hearing to the appellant—Validity.*

Order 44, rule 1 (2) of the Civil Procedure Code provides that the appellate Court shall fix a day for hearing the applicant or his pleader before rejecting an application for leave to appeal *in forma pauperis*. It is not enough if the Court peruses the judgments of the lower Court in Chambers and passes an order. In the absence of a hearing as required by the rule the order cannot be sustained.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court, Madurai, dated 18th April, 1962 and made in unnumbered O.P. of 1962 in unnumbered Appeal Suit of 1962 (Serial No. 1525 of C.R. No. 17, District Court, Madurai) (O.S. No. 100 of 1960, Sub-Court, Madurai).

S. Ramasubramaniam, for Petitioner.

T. N. C. Rangarajan for the Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—This revision is directed against the dismissal *in limine* in Chamber of an application for leave to appeal *in forma pauperis* made by the petitioner herein in the District Court, Madurai. The learned District Judge in his order just states that he has perused the judgment of the Subordinate Judge in the lower Court and was directing the appellant to pay court-fees under Order 44, rule 1, clause (2), Civil Procedure Code, by 13th June, 1962 on pain of the appeal being rejected on default. The Counsel who appeared for the petitioner in the lower Court has filed an affidavit that he was not heard in the matter and the appeal was not brought to the Bench and he was not given an opportunity to argue ; that is, the case for the petitioner before me is that the matter was disposed of without hearing the petitioner or his Counsel.

Now Order 44, rule 1 (2), Civil Procedure Code, which applies to pauper appeals provides :

> "The appellate Court after fixing a day for hearing the applicant or his pleader and hearing him accordingly if he appears on that day, and upon a perusal of the application and of the judgment and decree appealed from, shall reject the application, unless it sees reason to think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust."

So it is not sufficient that the learned District Judge has perused the judgment of the lower Court. He must have given a hearing to the applicant or his pleader

* C.R.P. No. 1714 of 1962. 23rd July, 1965.

fixing a date for hearing. In the absence of such hearing, the order cannot be sustained. I accept the affidavit of the Counsel that he was given no hearing and reject the recital in the preamble as to the presence of Counsel as routine drafting. The learned Government Pleader has nothing to say in the matter. In the circumstances the order rejecting S. No. 1525 of C.R. No. 17 of District Court, Madurai in the unnumbered appeal is set aside. The matter will be taken up again for consideration under Order 44, rule 1, clause (2) by the District Court and disposed of according to law. This revision is accordingly allowed. The papers will be sent back as expeditiously as possible as this case has been pending since 1962.

R.M. —— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Srinivasa Gounder .. *Petitioner**

v.

Kannu Gounder .. *Respondent.*

Negotiable Instruments—Promissory note endorsed by the payee—Suit by the endorsee against the maker of the promissory note and the payee—Plea of payment to the payee—If could affect the rights of the endorsee.

It is a settled principle of law that whenever one of two innocent persons must suffer by the act of a third, he who has enabled the third person to occasion the loss must sustain it.

Where the maker of a promissory note makes payment but leaves the promissory note in the hands of the payee after making the payment thereon and the payee, after receipt of the payment, endorses the promissory note to another, who had no knowledge of the payment, such endorsee who has taken the promissory note *bona fide*, cannot be affected by the alleged payments. He can maintain a suit for the amount both against the maker and the payee and a decree will have to be given against both.

Where there is negligence on the part of the maker in not having taken back the promissory note he cannot be allowed to plead absence of notice to an action by a holder in due course. There is no rule of thumb to determine the reasonable time for giving a notice of assignment.

Petition under section 25 of the Act IX of 1887 praying the High Court to revise the Decree of the Court of the District Munsif, Tirupattur, N. Arcot, dated 21st June, 1962 and passed in S.C.S. No. 826 of 1961.

T. R. Ramachandran and *T. M. Nagaraja Rao*, for Petitioner.

V. N. Krishna Rao, for Respondent.

The Court delivered the following

JUDGMENT.—This revision has been filed under the Provincial Small Cause Courts Act by the plaintiff whose suit as against the first defendant was dismissed by the learned District Munsif of Tirupattur. The plaintiff filed the suit as the endorsee of a promissory note Exhibit A-1 dated 27th July, 1959, the endorsement in his favour being by the second defendant, the original payee, by Exhibit A-3 dated 3rd May, 1960. On 6th September, 1961 both the plaintiff and the second defendant, the original payee, issued a notice to the maker for the money due under the promissory note and to this the plaintiff got a reply from the first defendant of payment and discharge of the promissory note on 7th June, 1960, the payment being made to the plaintiff's endorser, the original payee and second defendant in the suit. The trial Court held that the assignment of the promissory note in favour of the plaintiff was true and supported by consideration. However in regard to the plaintiff's claim for a decree against both the defendants, that is the maker and the original payee, the Court held that the first defendant, the maker, could not be held responsible or liable for the suit amount. A decree has been given only against the second defendant.

The learned Counsel, Sri T. R. Ramachandran, for the petitioner-plaintiff contends that the lower Court ought to have granted a decree in this case against the first defendant also. It is pointed out that the first defendant had no right to

* C.R.P. No. 1716 of 1962. 6th August, 1965.

pay the amount due under the promissory note to the second defendant without the second defendant producing the promissory note for cancellation. It is submitted that this act of the first defendant is negligence and he can plead no equity or justification for the payment in question. The learned Counsel submits that the fact that notice was issued by the plaintiff later than the alleged discharge is neither here nor there, because it is the duty of the maker to call upon the payee to produce the promissory note when making payment to him. In this connection the learned Counsel drew my attention to two judgments of this Court. In *Venkata Krishniah* v. *Manikyarau*[1] of Rajamannar, J. (as he then was), the facts were the promisee, under a promissory note payable on demand, not payable at a particular place transferred the note for consideration to the plaintiff. After the transfer the promisor paid off the original promisee, but instead of obtaining delivery of the note, or an indemnity against any further claim thereon, obtained merely a receipt. There was neither a presentment of the note nor a notice of assignment within a reasonable time. In a suit on the note by the transferee impleading the promisor and the transferor it was held by the learned Judge that according to section 64 of the Negotiable Instruments Act no presentment was necessary in order to charge the maker, and there could be no rule of thumb to determine the reasonable time for giving notice of the assignment. Further it was held that as there was clearly negligence on the part of the maker he cannot be allowed to plead absence of notice to the action by a holder in due course. This decision answers the contention of the Counsel for the respondent that the plaintiff ought to have, immediately after its assignment, given notice to the first defendant.

The other decision relied upon by the learned Counsel for the petitioner is the Bench decisions in *Gopalan* v. *Lakshmi Narasamma*[2]. The head-note there reads thus:

> "A maker of a promissory note payable on demand left the promissory note in the hands of the payee after making payment thereon. No demand had been made on the promissory note. After receipt of such payment the payee indorsed the promissory note to another who had no knowledge of the fact of payment. In a suit by the indorsee against the payee and the maker, the question arose as to whether a decree could be passed against the maker also.
>
> *Held* that such a decree could be passed under the provisions of the Negotiable Instruments Act. The principle laid down in *Lickbarrow* v. *Mason*[3] that whenever one of two innocent persons must suffer by the acts of a third he who has enabled the third person to occasion the loss must sustain it, also applied."

In the light of these decisions and in view of the conduct of the first defendant there can be absolutely no doubt about the liability of the first defendant also to the plaintiff's claim. In the result the revision succeeds. There will be a decree in the suit against the first defendant also with costs one set only against both the defendants. The parties will bear their respective costs in this Court. This revision is allowed accordingly.

R.M. —————— *Revision allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Veerappa Chettiar .. *Appellant**

v.

Veeraswamy Pandaram .. *Respondent.*

Civil Procedure Code (V of 1908), Order 34, rule 14—Applicability—Usufructuary mortgagee executing lease in favour of mortgagor after a long lapse of time after the mortgage—If lease back could be deemed part of same transaction as mortgage—Decree for arrears of rent under the later lease—Sale of mortgaged property in execution of the decree—If barred.

The prohibition against bringing the mortgaged property to sale otherwise than by instituting a suit for sale is only against the enforcement of the decree for payment of money in satisfaction of a claim arising under the mortgage. In cases where the mortgage and lease back form part of the same or

1. (1947) 2 M.L.J. 196.
2. I.L.R. (1940) Mad. 382.
3. (1787) 2 T.R. 63 : 100 E.R. 35.

*Appeal Against Appellate Order No. 150 of 1962. 19th August, 1965.

contemporaneous transaction and the lease back was in contemplation on the date of execution of the mortgage, it may be reasonable to treat both the documents as one transaction and a claim for lease amount may be treated as a claim arising under the mortgage. But where there is a long interval of 40 years between the mortgage and the lease, it cannot be said that they form part of the same transaction and the suit for arrears of rent cannot be said to be a claim arising under the mortgage.

In such cases the prohibition under Order 34, rule 14 cannot be invoked by the judgment-debtors.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated 24th February, 1962 and made in C.M.A. No. 94 of 1961 (M.P. No. 637 of 1961 in O.S. No. 298 of 1957, District Munsifs Court, Vridhachalam).

K. Sarvabhauman, for Appellant.

V. C. Sundararajan and *A. Doraiswamy Ayyangar*, for Respondents.

The Court delivered the following

JUDGMENT.—This is an appeal by the decree-holder-auction purchaser, in O.S. No. 298 of 1957 against the order of the First Additional Subordinate Judge of Cuddalore allowing M.P. No. 637 of 1961 filed by the judgment-debtors for setting aside the sale held on 16th August, 1961 under Order 21, rule 90, Civil Procedure Code.

The father of the respondents-defendants executed an usufructuary mortgage in favour of one Lakshmana on 5th October, 1913. Lakshmana had three brothers. A grandson of Lakshmana filed a partition suit O.S. No. 12 of 1943. The usufructuary mortgage debt was allotted to the share of Veerappa, the son of Rangaswami, one of the brothers of Lakshmana. In 1953, 40 years after the execution of the mortgage, the respondents, who are the sons of the original mortgagor, took the properties on oral lease from Veerappa. Veerappa filed O.S. No. 298 of 1957 for arrears of rent due on the oral lease. A decree was passed on 6th September, 1951. The properties were attached, brought to sale and purchased by the decree-holder on 16th August, 1961. Thereupon the judgment-debtors filed M.P. No. 637 of 1961 in O.S. No. 298 of 1957 out of which this Second Appeal arises for setting aside the sale, mainly on the ground that the properties could not be sold except by way of a separate suit under Order 34, rule 14, Civil Procedure Code. The executing Court held that Order 34, rule 14 had no application to this case and dismissed the petition. On appeal, the lower appellate Court held that the decree-holder could not have brought the properties to sale without filing a suit to enforce the mortgage as provided in Order 34, rule 14 of the Civil Procedure Code. It also held that the judgment-debtors had not waived their objection to protection under Order 34, rule 14. These two findings are questioned in this appeal by the decree-holder.

Order 34, rule 14 provides :

"Where a mortgagee has obtained a decree for the payment of money in satisfaction of a claim arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwithstanding anything obtained in Order 20, rule 2."

The prohibition against bringing the mortgaged property to sale otherwise than by instituting a suit for sale is against the enforcement of the decree for payment of money in satisfaction of a claim arising under the mortgage. The question for consideration is whether the suit that was filed, O.S. No. 298 of 1957, was a claim arising under the mortgage.

As already stated, the usufructuary mortgage was executed by the father of the respondents on 5th October, 1913 in favour of Lakshmana, one of the brothers. The oral lease, the arrears for which the present suit was filed, was in 1953, 40 years after the execution of the usufructuary mortgage. It may be noted that the mortgagee's right was allotted to one of the brothers' son in a partition suit, and the lease was given by him to the sons of the mortgagor. Taking into consideration the lapse of 40 years, it cannot be stated that, at the time when the usufructuary mortgage was executed, any lease was in contemplation. The two cannot form part of the same transaction. Further, the lease of the year 1953 could not have

been for securing interest due on the mortgage.' Taking all the circumstances, I have no hesitation in holding that the mortgage of the year 1913 and the lease of the year 1953 do not form part of the same transaction, and the suit for arrears of rent on the lease in 1953 is not a claim arising under the mortgage.

Reference was made to *Kuttyal* v. *Sanjiva Rao*[1] which was affirmed by a Bench of this Court in *Narasimhalu Chettiar* v. *Ramanatha Mudaliar*[2]. In *Kuttyal* v. *Sanjiva Rao*[1], it was observed that in order to treat both the documents as one transaction, it was not necessary either that both the mortgage and the lease back should have been embodied in one document or that they should have been executed on one and the same date. The learned Judge observed :

"I do not think that proposition can admit of any controversy. One essential condition is that at the time of the execution of the mortgage the lease back should have been in contemplation."

In that case, the lease was executed on the day following the execution of the mortgage, and admittedly the lease was in contemplation on the date of the execution of the mortgage. In this case, the lease could not have been in contemplation, as it was executed 40 years after the mortgage.

In *Narasimhulu Chettiar* v. *Ramanatha Mudaliar*[2], the decision in *Kuttyal* v. *Sanjiva Rao*[1] was approved and it was observed that it was well established that a decree for rent arising out of a lease back in favour of the mortgager by the mortgagee in possession as part of the mortgage transaction was a claim arising under the mortgage. In the case before the Bench also, the facts were similar to those in *Kuttyal* v. *Sanjiva Rao*[1], the lease being contemporaneous with the mortgage. In *Chinnappayyan* v. *Narayana Pattar*[3], Wadsworth, J., observed that the fact that the mortgage was on one day and the lease was on the next day could have very little bearing on the question whether the lease and the mortgage formed part of the same transaction. He further observed that the mortgage and the lease documents formed part of the same bargain and that the lease was intended to implement the undertakings of the mortgage. The learned Judge found that, instead of providing for a simple mortgage with payment of interest in cash, the common device was employed of drafting the mortgage as a usufructuary mortgage and making the mortgagor a tenant paying rent; and that the transaction was in its essence a mortgage in which interest was collected in the shape of rent. The facts of the case just cited clearly make out that the two transactions were the same and arrears due by way of rent was a claim arising under mortgage.

Learned Counsel for the respondents was unable to cite any decision in which the documents were held to form part of the same transaction when the lease was executed 40 years after the mortgage. On the facts, there can be no doubt that the lease did not form part of the mortgage transaction and the suit for arrears of rent was not a claim arising out of the mortgage. The judgment-debtors are, therefore, not entitled to avail themselves of the protection given under Order 34, rule 14 of the Civil Procedure Code.

In the view taken, it is unnecessary to consider the question whether the judgment-debtors had waived the right under Order 34, rule 14, in that they did not take objection, when the property was attached and ordered to be sold and the upset price reduced.

In the result, the Second Appeal is allowed with costs and the application M.P. No. 637 of 1961 dismissed.

No leave.

R.M. ——— *Appeal allowed.*

1. (1952) 2 M.L.J. 675 : A.I.R. 1952 Mad. 877.
2. (1961) 1 M.L.J. 363.
3. (1940) 1 M.L.J. 143 : A.I.R. 1940 Mad. 59.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

L. Damodaraswami Naidu .. *Appellant**

v.

S. T. Damodaraswami Naidu .. *Respondent.*

Easements—Urban servitudes—Right of a property owner to go upon the adjoining property to repair and maintain his wall.

The origin of servitudes is as ancient as property itself and praedial servitudes have originated from the disposition of nature, wants of society and the agreements of individuals. The classification of such servitudes as 'urban' 'and 'rustic' has lost much of its significance in modern days.

Where the boundary wall of a house is exposed to sun and rain, the owner of that house is entitled to have it protected and for that purpose the neighbour is liable to give access to the owner of the wall for purposes of repairing and whitewashing it. The neighbour will be entitled to a similar right as against his adjoining owners. This is a well recognised right of owners of properties in urban areas and is one of the miscellaneous easements known as urban servitudes.

Such a right need not be acquired by prescription. There may be cases of implied grant of easements for repairs by long acquiescence. Where the wall in question is an ancient one and it has necessarily to be maintained by periodical repairs a Court can infer an implied grant by acquiescence. But such acquiescence would naturally and necessarily be only subject to the limitation that the neighbour would not be inconvenienced nor condemned to keep the space open for ever.

Such a right of easement to repair may, subject to the provisions of section 24 of the Easements Act, also be sustained on grounds of right to lateral support.

Appeal against the Decree of the Court of the (II Additonal) Subordinate Judge of Coimbatore in Appeal Suit No. 163 of 1960 preferred against the Decree of the Court of the (II Additional) District Munsif of Coimbatore in Original Suit No. 474 of 1958.

P. S. Balakrishna Ayyar and *P. S. Ramachandran*, for Appellant.

S. Mohan, for Respondent.

The Court delivered the following

JUDGMENT.—The short question for decision in this Second Appeal is whether the appellant who is the plaintiff has a right to go over the vacant space of the defendant for the purpose of repairing and whitewashing the northern outer side of the plaintiff's wall. The trial Court held that the plaintiff had such rights subject to certain limitations as to the time and extent so as not to inconvenience or cause hardship to the defendant in the enjoyment of his property. The learned Subordinate Judge on appeal held contra taking the view that he was bound by a Bench decision of this Court in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1], and must follow it in preference to *Subramania* v. *Pachiappa*[2], a decision of a Single Judge of this Court.

The plaintiff and defendant are owners of adjoining properties, the defendants being the owner of the northern property. The houses faced east and between the houses of the plaintiff and the defendant there is a strip of vacant land. Normally there would have been no obstruction to the plaintiff having access to the northern side of his compound wall for repairing, over the space of the defendant. But he brought this opposition to the course from the defendant by his own act, namely, his instituting the suit O.S. No. 212 of 1956 on the file of the District Munsif's Court, Coimbatore, claiming title to the vacant space and a mandatory injunction for pulling down some construction which the defendant had erected. It is an admitted fact that the plaintiff had been over this vacant space to repair his wall once about five years prior to this suit. The defendant would have it that it was by consent. Be it express consent or tacit acquiescence, so long as he is not inconvenienced and no rights are claimed, the neighbouring landowner generally does not object to such access for repairs. The wall in question was in the open and the right asserted by the plain-

*S.A. No. 1906 of 1961. 24th September, 1964.

1. (1912) 16 Ind. Cas. 893. 2. (1956) 1 M.L.J. 570: A.I.R. 1956 Mad 577.

tiff in this suit is the right of access over the available open space to repair and whitewash the northern face of the wall periodically. The wall is an ancient one and according to the plaintiff has been in existence for over 30 years. The defendant is a recent purchaser of his property having purchased the same in 1949, and in his deposition states that he has no knowledge if the plaintiff was whitewashing the wall before his purchase. He admits that the plaintiff has no other way except to enter his property and whitewash the northern wall. The plaintiff in his deposition has stated that his house is south of the defendants and has been in existence for over 30 years. It is elicited from him in cross-examination that till the defendant's prior owner Chinni Thayammal constructed a wall in the open space, the plaintiff was repairing the wall under the impression that he had title to the open space. The only inconvenience pleaded by the defendant is that he intended putting up a construction, and, if the plaintiff is given the right of access, then he could not put up any construction. The apprehension is imaginary as the plaintiff cannot require the defendant to keep his land as an open space.

In *Subramania* v. *Pachiappa*[1], Krishnaswami Naidu, J., observes :

"In the present case it cannot be said that the wall in question is a party wall in that sense. But it is common knowledge that the boundary walls of houses not capable of being repaired from the owner's side are generally repaired by entering into the adjoining owner's house and no reasonable neighbour would ever object to repairing such walls by gaining access into his house as he would be in the same position with his other neighbours with regard to repairing of boundary walls."

The argument in that case was that the right to enter the defendant's premises to repair the wall could only be acquired by prescription as an easement and that the evidence in the case was not sufficient to establish that the plaintiff had acquired that right. The evidence in the case showed only, that 25 years previously the plaintiff's men had been over the defendant's property to repair the wall in question. After referring to the decision in *Bhagavatula Subramania Sastri* v. *Bhagavatula Lakshminarasimham*[2], the learned Judge goes to the consideration of the case thus :

"The plaintiff has been declared to be entitled to the wall in dispute by the lower appellate Court with which finding I am unable to see any ground for interference and the only question is whether the plaintiff in order to repair his wall standing on the defendant's side has a right to go to the defendant's side to carry out repairs or plastering and whether such a right has necessarily to be acquired by prescription or whether such easement could be considered as a right attached to the ownership of the property."

The learned Judge has taken the view that there was no need to establish any acquisition of the right in question by prescription as repairs to such walls will be carried out only periodically as and when there was necessity, that such a right cannot be expected to be acquired by prescription and since such a right to repair the northern wall is being conceded by neighbours in towns, it should be considered as a customary easement under section 18 of the Easement Act, a right which could be acquired only by virtue of a local custom. Holding that though there was no evidence in the case of such a local custom, the plaintiff could not be denied the right to carry out the repairs to his wall by entering into the defendant's property as such a right is being recognised and permitted in towns where houses are situated adjoining each other and such rights being exercised must be deemed to arise in pursuance of a local custom, the learned Judge held that the plaintiff in that case should be held to have such a customary easement. The plaintiff's right was declared subject to restrictions in its exercise as not to cause inconvenience to the defendant. In another unreported case in *Erathavammal* v. *Subbu Naicker*[3], the same learned Judge has considered the matter again *in extenso* and viewed this right of access for repairs as one coming within the term "urban servitudes". Once again the learned Judge discussed the scope of the Division Bench in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[2], and expressed as follows his view of the matter :

"It appears to me that irrespective of whether the right to project eaves over the neighbour's property is clear or nor by the mere fact that a boundary wall of a house is exposed to sun and rain, the owner of that wall is entitled to have it protected and for that purpose the neighbour is liable to

1. (1956) 1 M.L.J. 570 : A.I.R. 1956 Mad. 577.
2. (1912) 16 I.C. 893.
3. S.A. No. 796 of 1953.

give access to the owner of that wall for the purpose of repairing and whitewashing it. The neighbour is entitled to a similar right as against that person or his other neighbours. This is a well recognised right of owners of properties in urban areas and I should consider that this is one of the miscellaneous easements which has been recognised and comes within the term of urban servitudes."

The origin of servitudes, it has been stated, is as ancient as that property of which they are a modification. Limitation on the right in property, referred to as praedial servitudes are stated to have originated from the disposition of nature, wants of society and the agreements of individuals. Praedial servitudes have been classified into urban and rustic servitudes not now of much significance—the former including all servitudes relating to buildings wherever situated, the latter relating to land uncovered by buildings whether situated in town or country. The rustic servitudes are stated to comprise rights of way and water courses and rights to drive cattle to water and the urban servitudes comprehended all those which belonged to a building as eaves droppings, support of beams, right of light, etc.

Now in *Bhagavatula Subramania Sastri* v. *Bhagavatula Lakshminarasimham*[1] relied on by the lower Court the right to repair was considered specifically with reference to three walls. The first wall *W*-1 was held to have fallen to the share of the plaintiff at a partition and as he was undoubtedly entitled under the partition instrument to enjoy the wall, the repair of the wall was considered reasonably necessary for its enjoyment and the right to go to the defendant's side of the wall to repair it was viewed as a necessary easement. The plaintiff however was held not entitled to go over the defendant's roof for the purpose. Another wall *W*-4 supported the plaintiff's eaves which projected over the defendant's house. The learned Judges considered that the wall was necessary to support the eaves and that in order that the easement with regard to the projection of the eaves may be enjoyed it was necessary that the walls on which the eaves rest should be repaired. As it was not reasonably possible to repair the wall except by going on the defendant's land, they upheld the plaintiff's claim providing limits on the exercise of the rights. Then they took up for consideration a wall which had been erected within two years prior to suit. With reference to this the learned Judges observed :

"There is no evidence of any contract by the defendant permitting the plaintiff to go to the defendant's side of the wall to repair it in order that his eaves might be protected. We may note that it is rather confusing to speak of acquiescence as a source of asement unless that acquiescence amounts to an implied contract granting the easement, any omission to object to the enjoyment of the easement will not give the dominant owner any right except in cases where the enjoyment has gone on for the prescriptive period and an easement by prescription can be claimed having regard to the nature of the right. There is absolutely no evidence of any customery right to support the plaintiff's claim with regard to *W*-3."

It may be noticed that the learned Judges have recognised the possibility of acquisition of a right to an easement of access for repairs by acquiescence when it would amount to an implied contract granting the easement. In Gale on Easements, 12th Edition at page 55 it is observed that there are

"numeours cases in which an agreement to grant an easement or some other right has been inferred or more correctly has been imputed to the person who is in a position to make the grant, on account of some action or inaction on his part. These cases rest on the equitable doctrine of acquiescence; but they may be referred to, for the purpose of classification as imputed or constructive grants."

The wall in question in this case is an ancient wall. It has been built at the extreme northern edge of the plaintiff's property. It is exposed and could be maintained only by periodical attention which necessarily requires going over the neighbour's open space. As no writing is required for the imposition of an easement, an implied grant by acquiescence to such course could be inferred in the circumstances. Necessarily and naturally the acquiescence would be subject to the limitation that the neighbour was not inconvenienced nor condemned for ever to keep the space open, and so the easement right recognized would be subject to those limitations.

It may be looked at from another angle. The owner of the wall by reason of its location also could in the circumstances be held to have acquired a right of lateral

1. (1912) 16 I.C. 893.

support to that wall. Applying the reasoning of the learned Judges in *Bhagavatula Subramania Sastri* v. *Bhagavatula Lakshminarasimham*[1] it could be said in this case that for any enjoyment of the right of easement of lateral support which the plaintiff had acquired to his wall, the wall itself must be kept in good repair and as an accessory to that easement, it could be held that he may do acts necessary to secure the full enjoyment of the easement right. Of course there is a limitation in the exercise of such rights. Section 24 of the Easements Act itself limits the exercise of accessory rights by providing that it must be done at such time and in such manner as without detriment to the dominant owner to cause the servient owner as little inconvenience as possible. The mere convenience or whim and fancy of the dominant owner is not the determining factor for the exercise of the accessory right. If the act proposed does not inconvenience or injure the servient owner, there could be and normally would be no valid objection on his part. If the act proposed would cause substantial inconvenience to the servient owner, then the question of justification on the part of the dominant owner would arise when absolute necessity and not inconvenience would alone provide the test. If the act is necessary for the enjoyment of the easement, the dominant owner in such cases has to suit his time and manner to the reasonable convenience of the servient owner. The dominant owner should not increase the burden on the servient owner nor cause unnecessary inconvenience and hardship to the servient owner. The time and manner of doing it must be such that the dominant owner if he were the servient owner and a reasonable man would prefer to have it done.

As has been noticed above, the wall in question in this case is an open boundary wall and requiring periodical repairs like white-washing and plastering for its due maintenance. It is an ancient wall and, according to the plaintiff, it has been in existence for over thirty years. In my view, the observations of the learned Judges with reference to the wall *W*-3 in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1], will not apply to the present case as the wall in question there had been in existence for about two years prior to suit and was referred to as a new wall. No doubt Krishnaswami Naidu, J., in Second Appeal No. 796 of 1953, has observed that the existence of the right does not depend upon the age of the wall or the acquisition of the right by prescription but it is a right attached to the ownership of the wall itself. It is unnecessary to consider this aspect of the matter in the present case and if it were I am bound by the decision of the Division Bench even as Krishnaswami Naidu, J., was.

My attention was drawn by the learned Counsel to a recent decision of Veeraswami, J., in *Kamalammal* v. *Chakravarthy*[2]. It was not necessary to discuss the question because the Court in that case was not called upon to decide whether this right of access was a necessary easement that would attach to every wall. Therein referring to *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1], the learned Judge has observed as follows :—

"In that case all that was held was that a house owner in order to repair his wall on his neighbour's side of the premises had the right to go to the other side of the wall on the land of his neighbour, the right being in the nature of a necessary easement."

The question in the case before Veeraswami, J., was a claim to access through a staircase inside the other party's house to repair a wall in the first floor. This claim was denied pointing out that in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1], it was also held that the easement of access for repairs did not extend going over the neighbour's roof for the purpose. Whether the right of access for repairs would be a necessary easement was not the subject of decision by Veeraswami, J. In the view I take, and as the facts of the present case differ from the facts of the decision in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1] I prefer to follow the decision of Krishnaswami Naidu, J., and hold that the plaintiff in this case has the right he claims to go over the vacant space of the defendant to carry on repairs to the exposed northern wall. It may be rested as an urban servi-

1. (1912) 16 I.C. 893.
2. (1964) 2 M.L.J. 241.

tude customarily enjoyed or on the facts of this case as a grant implied from the existence of the wall for over twenty years at the very extremity of the property.

The trial Court while granting the decree has imposed limitations on the exercise of the right. The Court below has provided that the plaintiff should be allowed to exercise the right twice a year, once in January and once in June. I do not see any need for giving access twice during the year for repairs. In my view as in *Bhagavatula Subramanya Sastri* v. *Bhagavatula Lakshminarasimham*[1], it would be sufficient if the plaintiff is permitted to go on the defendants land for repairing the wall in question once a year. He must, as provided by the trial Court give a fortnight's notice in writing at the time when he intends to make the repairs. The repairs, as already provided should be between 9 A.M. and 5 P.M. and shall not exceed four days in the year.

In the result, the decree of the learned Subordinate Judge is set aside and the decree of the trial Court is restored subject to the above modification. In the circumstances of the case, I direct the parties to bear their own costs throughout.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

Chotilal Sowcar .. *Appellant**

v.

Jawantraj Sowcar .. *Respondent.*

Usurious Loans Act (X of 1918), section 3 (b)—" any suit "—Meaning of—If would include a claim by a mortgagee for the compensation amount under section 30 of the Land Acquisition Act.

Land Acquisition Act (I of 1894), section 30—Proceedings under—Nature of—If a suit—If would attract the provisions of Usurious Loans Act.

In interpreting a statute like the Usurious Loans Act which is a beneficial enactment providing relief to debtors under certain circumstances of oppressive rates of interest, the Court should adopt a generous interpretation and not a narrow or literal interpretation which will not be in consonance with the object of the Act or the intention of the Legislature.

The term 'suit' is not confined strictly to an action. Any proceeding in a Court of justice to enforce a demand is a suit. When used in statutes it is capable of an extended or restricted interpretation as the context and the intention of the Legislature in enacting the particular statute appears to the Court to require.

The word "suit" in section 2 (3) of the Usurious Loans Act cannot be interpreted in a restrictive sense of a proceeding commenced by a plaint under the Civil Procedure Code. A proceeding in a Court following a reference under section 30 of the Land Acquisition Act will be a suit within the meaning of the Usurious Loans Act and a party entitled to the compensation amount deposited can invoke the aid of the Act to get relief against excessive interest against his creditor who claims a right over compensation amount in those proceedings.

Appeal under clause 15 of the Letters Patent against the Judgment and decree of the Honourable Mr. Justice Venkatadri dated 7th March, 1962 and passed in the Memo. of Cross Objections in Appeal No. 157 of 1959, preferred against the decree of the City Civil Court, Madras, dated 14th August, 1958, in L.A. C. No. 5 of 1957.

Sundararajan and *Sivaswami*, for Appellant.

M. K. Harihara Ayyar, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.:—This Letters Patent Appeal involves a question of considerable interest, which does not appear to have been the subject of judicial decision in the precise form in which it has been raised, so far, concerning the interpretation of section 3 (*b*) of the Usurious Loans Act X of 1918. The Preamble

1. (1912) 16 I.C. 893.

*L.P.A. No. 7 of 1963 against Appeal No. 157 of 1959. 8th January, 1965.

to this Act sets forth that, " it is expedient to give additional powers to Courts to deal in certain cases with usurious loans of money or in kind."

The expression " suit to which this Act applies " is interpreted in section 3 as " any suit," to which section 3 (*a*) or (*b*) or (*c*) applies. Section 3 (*b*) " for the enforcement of any security taken or any agreement."

We are now in a position to describe the context of facts in which the argument has arisen. In consequence of certain requisition proceedings relating to S.No. 3477, there was a reference to Court under sections 30 and 31 (2) of the Land Acquisition Act by the Collector of Madras, on the ground of a dispute between a certain Jawantraj Sowcar, the owner of the property, who is the respondent here and Chotilal Sowcar, the mortgagee in respect of the same property, who is the appellant. A sum of Rs. 26,126-12-6 was deposited into Court, and portions of this amount were drawn by the respective claimants, upon a joint endorsement. The only question which was agitated before the learned Principal Judge in the City Civil Court, was that the interest stipulated in the promissory note embodied in the security (equitable mortgage by deposit of title-deeds), *viz.*, 15 per cent. per annum compound, was excessive and usurious. The learned Judge, after referring to the arguments before him, determined the interest at 14 per cent. simple. An appeal was instituted from this decision by Jawantraj Sowcar, the owner of the property before Venkatadri, J., in which the same issue, of a very restricted scope was canvassed. Without deciding the particular ground of law, which is now urged before us, the learned Judge directed, as the course most compatible with the interests of justice, that the difference claimed as payable towards interest might be disallowed. From this decision of Venkatadri, J., the mortgagee (Chotilal Sowcar) has preferred the present Letters Patent Appeal.

The issue that is involved may be tersely set forth as follows. As we have seen from the relevant provisions of the Usurious Loans Act, the words descriptive of the proceeding to which the Act applies, are " any suit " and under section 3 (*b*), it is clear enough that the language used by the Legislature would include an action of this character, a mortgage claim or the claim of a security upon immovable property. But this is not a mortgage suit in the formal sense. What was before the Court was a reference under sections 30 and 31 (1) of the Land Acquisition Act. Indisputably, section 73 of the Transfer of Property Act will apply to this security, and, since the property has been acquired under the Land Acquisition Act, under section 73 (2), the mortgagee " shall be entitled to claim payment of the mortgage money, in whole or in part, out of the amount due to the mortgagor as compensation." The real point for our determination is whether the proceeding in Court arising out of the reference can be justly or properly termed " a suit." If it is not a suit, the argument is certainly conceivable that the Usurious Loans Act itself will not apply, and consequently, that no relief can be granted to the mortgagor in the shape of reduction of the interest stipulated, though, otherwise, the rate might be usurious.

Two points appear to arise for our determination in the light of the arguments now advanced. The first is : in construing a beneficial enactment of this kind providing relief to debtors under certain circumstances, with regard to a rate of interest that might be justly termed as aggressive, what should be the perspective of approach by the Court ? Would the Court be justified in construing the words of statute so strictly, as to exclude from its ambit all proceedings which are not literally in character with the terminology employed, and comprised in it ?

The second is, do the precedents admit of an enlarged sense or comprehension of the expression ' suit,' so as to justify the inference that the reference to a Court under section 30 will result in a proceeding which may be justly termed " a suit " ?

Even before proceeding to the precedents, we would like to state that the perspective of approach should certainly be generous, a narrow or very literal perspective will not be in consonance with the Preamble to the Usurious Loans Act that we have earlier set forth, or the principles of construction of statutes of this type, having in

mind the probable intention of the Legislature. As observed in Maxwell on Interpretation of Statutes, 11th edition, page 66, section (2),

"It is said to be the duty of the Judge to make such construction of a statute as shall suppress the mischief and advance the remedy. Where the usual meaning of the language falls short of the whole object of the Legislature, a more extended meaning may be attributed to the words, if they are fairly susceptible of it. The construction must not, of course, be strained to include cases plainly omitted from the natural meaning of the words."

Having this perspective in mind, if we approach the matter, we shall at once see that, in the available precedents, an expression like 'suit' has been given either a more extended meaning, or a more restricted interpretation, as the context and the intention of the Legislature in enacting the particular statute, appeared to the Court to require. The principle of the wider meaning was stated very early by Peacock, C.J., in *Morro Chunder Roy Choudhry* v. *Shoorodhonee Debin*[1]. The learned Chief Justice observes:

"The word 'suit' does not necessarily mean an action........Any proceeding in a Court of justice to enforce a demand is a suit............"

There have been decisions of this Court to the effect that a "suit," according to section 48, Civil Procedure Code, must commence with a plaint, and this relatively restricted interpretation appears in certain of the cases to which our attention has been drawn. One such case is *Venkata Chandrappa Nyanivaru* v. *Venkatarama Reddi*.[2] The learned Judges observed that a proceeding which is capable of terminating in a decree or order having the force of a decree, cannot, on that ground alone, be deemed to be a suit within the meaning of the Code, if it had not been commenced with a plaint. In *Premnath* v. *Premnath*[3] the expression 'suit' has been interpreted as a proceeding in a Court of justice for the enforcement of a right, involving a legal proceeding of a civil kind. In *Hansraj* v. *Dehra Dun M.E.T. Co.*,[4] the word 'suit' has been interpreted as a civil proceeding instituted by the presentation of a plaint. In *Mahalinga Kudumban* v. *Theetharappa Mudaliar*[5] there are references to the same issue, but what was actually decided was that the decision of a Court under section 30 of the Land Ascquisition Act is a decree within the meaning of section 2 (2) of the Civil Procedure Code, and not an award. Since, under the Civil Procedure Code, the decree under section 2 (2) has been defined as a formal expression of adjudication, which conclusively determines the rights of parties or matters in controversy, "in the suit," it could conceivably be maintained that a proceeding which terminates in a decree *per se*, in the technical sense, would be a suit. Other decisions to which our attention has been drawn are relatively wide of the matter strictly in issue, for, either they relate to other enactments, or to the character of a decree. We might cite, for instance, *Chikkamal Chettiar* v. *Perumal Chettiar*[6] and *Rajagopala Chettiar* v. *H. R. E. Endowments Board*[7] which relates to a decision under section 84 (2) of the Hindu Religious Endowments Act, and such decisions under the Arbitration Act as *Mordhwaj* v. *Bhudar Das*[8] and *Premnath* v. *Premnath*[3] earlier referred to. In *Farkundali* v. *V. B. Potdar*[9] an interesting observation can be found to the effect that the word 'suit' is a term of art, and ordinarily means a proceeding instituted in a civil Court by the presentation of a plaint.

But this does not resolve the difficulty by any means, for, in a certain sense, it begs the question. We have to consider the word 'plaint,' and we find that, in Jowitt's Dictionary of English Law, that is defined as "the statement in writing of a cause of action." If that concept has to apply, and not merely a specific provision of the processual law, the proceedings resulting from the reference under section 30 would well be held a suit prefaced by the presentation of a plaint, for, admittedly, the statements of claim have to be filled into Court, upon which the adjudication proceeds. In our view, the catena of decisions that we have cited above, will appear

1. (1898) 9 W.R. 402.
2. I.L.R. 22 Mad. 256.
3. A.I.R. 1963, Pun. 62.
4. L.R. 60 I.A. 13 : 64 M.L.J. 403. : A.I.R. 1933 P.C. 63.
5. 56 M.L.J. 387.
6. (1940) 1 M.L.J. 732 (F.B.)
7. 66 M.L.J. 43 (F.B.)
8. A.I.R. 1955 All. 353.
9. A.I.R. 1962 Bom. 162 (F.B.)

to justify both a broader interpretation, and a more restricted interpretation of an expression like 'suit,' depending upon the context of occurrence, the nature of the statute, and the intendment of the Legislature as can be gathered from the Preamble to the statute and other permitted means. Similarly even the word 'plaint' may admit of the two kinds of interpretation; in relation to particular provisions of the processual law, it may mean a statement of claim made in a civil Court, in accordance with these provisions. But it may well embrace a wider category of instances, as the definition given by us from Jowitt's Dictionary of English Law would appear to justify. In any event, we are quite unable to see why the word 'suit' as occurring in section 2 (3) of the Usurious Loans Act, should be interpreted in a restrictive sense, as a proceeding which has commenced with a plaint under the Code of Civil Procedure. Even under section 26, Civil Procedure Code, it is noteworthy that every suit is to be instituted by the presentation of a plaint, "or in such other manner as may be prescribed." The wider connotation of the concluding words of section 26 has been noted in *Balaram Singh* v. *Dedh Nath*[1] which held that a proceeding under section 12 of the U. P. Agriculturists' Relief Act is a proceeding in 'a suit' before a civil Court within the meaning of section 21 of the Arbitration Act, and that the Arbitration Act applies to such proceedings. Hence, whether viewed in the light of the available case-law, or in the true perspective of approach to the expression used in a beneficial statute, the object of which was to relieve debtors in all civil proceedings or proceedings of a civil character, from the burden of an oppressive rate of interest, we are fully satisfied that the proceeding in a Court following a reference under section 30 would be one in which the provisions of this Act could be invoked by the concerned party, treating that proceeding as one to which section 2 (3) of the Act applies. From another point of view, it could well be maintained that the statement of claim by the concerned party, which has to be necessarily filed into Court, following the reference under section 30 partakes of the character of a *plaint* and could be brought within the scope of that expression. Accordingly, we are of the view that the Act can be invoked by the debtor (mortgagor) to claim relief from the excessive rate of interest appearing in the bond.

We do not think it necessary to discuss cases upon the issue whether the particular rate of interest specified in this instrument is usurious and excessive or otherwise. It is true that both the parties were members of the Marwari community, and at arm's length, as far as we can judge. But that does not mean that, in a contract or bargain of this kind the debtor is not relatively at a disadvantage, and, what would be a usurious or excessive rate of interest would depend on the facts of each case, the value of the security offered, the availability of money in the open market, and many other factors which need not be particularised here. We are fully satisfied that the rate of interest (15 per cent. compound with yearly rests) is excessive, and that the interests of justice require the award of relief to the debtor (the mortgagor). We find from the record that, on 16th March, 1959, a sum of Rs. 994 alone was further due from the mortgagor. We think that the course which would best subserve the interests of justice, on the facts of this particular case, would be the direction that this will be the decretal amount now, carrying no interest from 16th March, 1959, till to-day. From to-day onwards, this will carry the usual interest, *viz.*, 6 per cent. per aunum. The suit is accordingly decreed with proportionate costs.

R.M. *Order accordingly.*

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1. A.I.R. 1949 All. 100.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE M. NATESAN.

P. Kadar Batcha .. .. *Appellant**

v.

K. A. Alagarswami Naicker .. *Respondent.*

Tort—Trespass upon person—Police Officer hand-cuffing an under-trial in hospital and chaining him to the window—If liable in tort for damages.

Madras District Police Act (XXIV of 1959), section 53—Scope of protection under.

If an act is done by a Police Officer maliciously, it ceases to be an act done or intended to be done under the provisions of the District Police Act. The moment an act is shown to be malicious it ceases to be protected by section 53 of the Act and the three months period of limitation does not apply.

Where a Police Officer, without any justification and contrary to the specific departmental rules and instructions, handcuffs an under-trial undergoing treatment in hospital and chains him to a nearby window as if he is a dangerous animal, it cannot be said that his conduct is *bona fide* and he will be liable for damages in tort. In such cases it is not necessary for the victim of the tortious act to attribute and prove an intention or motive on the part of the Police Officer. If the Officer has exceeded and abused his authority it may even be out of arrogance or even because of temperamental defect which delights in cruelty, the act will be malicious and *mala fide*, unless it can plausibly be contended that the circumstances justified the use of the power.

Appeal under clause 15 of the Letters Patent against the judgment and decree of the Honourable Mr. S. Ramachandra Iyer, dated 9th March, 1963, and passed in S.A. No. 1278 of 1960 preferred against the decree of the District Court of Ramanathapuram at Madurai dated 5th January, 1960, and passed in A.S. No. 101 of 1959 (O.S. No. 27 of 1958, D.M.C., Sattur).

S. K. Ahmed Meeran and *M. Khaja Mohideen*, for Appellant.

G. Ramanujam and *T. N. C. Rangarajan*, for Respondent.

The Judgment of the Court was delivered by

Anantanarayanan, O.C.J.—This Letters Patent Appeal has been instituted by the defendant in an action for recovery of a sum of Rs. 1,000 as damages, for trespass to person. After a review of the facts, and the principles of law applicable to a case of this kind, Ramachandra Iyer, J. (as he then was) decided in S.A. No. 1278 of 1960, firstly, that there was trespass committed by the appellant upon the person of a certain Alagarswami Naicker (plaintiff in the suit), next that the trespass occurred under such circumstances of malicious and *mala fide* action as to entitle the plaintiff to damages ; and, finally, that the claim for damages in regard to this tort was not barred by limitation, with respect to the provisions of section 53 of the Madras District Police Act. The learned Judge quantified the damages at Rs. 100 and gave a decree for that amount, with subsequent interest and costs. He also granted leave, and hence the Letters Patent Appeal by the defendant.

The facts are practically not in dispute, and learned Counsel for the appellant, Mr. Ahmed Meeran, has been fair enough to concede the major facts which are incontrovertibly established by the record. The appellant is a Sub-Inspector of Police, and he arrested the plaintiff-respondent on the afternoon of 1st January, 1957, in connection with injuries caused to a certain Lakshmapathi Naicker on 30th December, 1956. The plaintiff was admittedly then produced by the Police Officer (appellant) before the Sub-Magistrate, and remanded by the Magistrate to the Sub-Jail at Sattur. Immediately thereafter, the plaintiff complained of severe colic, and was removed to the Government Hospital at Sattur where he was an in-patient till 25th January, 1957. Though the learned Judge (Ramachandra Iyer, J.) differed from the concurrent decrees of the Courts below dismissing the claim of the plaintiff, this is not upon any varying view of the merits of the evidence, but on an analysis and application of the principles of law relevant to the facts ; actually, the learned Judge accepted the concurrent findings of the trial and the

* L.P. Appeal No. 102 of 1963. 1st February, 1965.

first appellate Courts. It is clear from those findings that this Police Officer (appellant) went to the hospital the next morning, and directed the Police sentry guarding the plaintiff to put fetters (handcuffs) on him; not merely this, the plaintiff was handcuffed and chained like a dangerous animal, to a neighbouring window bar.

A Medical Officer made his routine visits on 4th January, 1957, saw the plaintiff chained in that manner, and raised objections. It was only thereafter that the fetters and the chains were removed. On that very day, the Court enlarged the plaintiff on bail. Subsequently, the plaintiff was tried along with others upon a charge under section 307, Indian Penal Code and acquitted. After the acquittal, the plaintiff preferred the present claim for damages, for a tort committed on his person.

Learned Counsel for the Police Officer (appellant) has taken us through the entire record, and laid emphasis upon those parts of the evidence which relate to a possible motive for the appellant to have wreaked vengeance upon the plaintiff, by having him chained in that brutal fashion. According to the learned Counsel, there is no reliable evidence about proof of either of the motives alleged. Even so, and accepting this argument, the question is whether, nevertheless, the tort committed was not *mala fide* and malicious. It is not the law that, with reference to the commission of a tort of that character, a motive or intention should be attributed and proved. If the Officer has exceeded and abused his authority, it may be out of arrogance, or even because of a temperamental defect which delights in cruelty, the act would be malicious and *mala fide*, unless it can plausibly be contended that the circumstances justified the use of the power. In the judgment of the learned Judge, we find a verbatim extract of Order 666 of the Madras Police Standing Orders, Chapter XXXI, page 423 in Volume I (1960 Edition), which gives detailed instructions for the use of handcuffs or fetters. It is not necessary to again cite the passage here. We think it is sufficient to observe that we have perused it very carefully, and its purport and the limits specified in the instructions, are crystal clear. Assuming, as was sought to be argued in this case, that the Officer was prompted to take extra precautions because certain instances of escape from custody had previously occurred, and the higher Police Authorities had emphasised the need for vigilance, nevertheless, the particular use of the fetters and the chain evidenced by the record in this case, has no shred of justification. In reality, the instructions do not relate to the use of any chain at all for chaining an under-trial prisoner like a ferocious animal; that contingency is not even contemplated. The use of fetters or handcuffs is permitted, within strict limits, generally where a prisoner is being conveyed, and the escort reasonably apprehends that he might try to escape, if not suitably restrained. In the present case, the prisoner (plaintiff) was in hospital, kept in bed upon a complaint of severe colic. There was a Police sentry guarding him. Even if the Officer feared that the sentry might be negligent, his proper duty would be to warn the sentry, or to post another guard if feasible. The imposition of handcuffs was not called for, even on the most liberal interpretation of the state of mind of the Officer, or the exigencies of the situation. Certainly, the chaining of the prisoner to a window bar was quite outside the ambit of the instructions, and can only be characterised as a piece of brutality; indisputably amounting to a tort or a trespass on person.

The learned Judge (Ramachandra Iyer, J.), has quoted certain authorities for the view that, under such circumstances, the trespass must be considered as both *mala fide* and malicious in law, and the victim would be entitled to damages. One of those passages is from Fleming on Torts (1957 Edition) and another is from Clarke and Lindsell on Torts (11th Edition). The learned Judge has also referred to *Newel* v. *Starke*[1] and the true principle which applies to this situation was enunicated by Lord Atkinson in the form that "A man is entitled to protection if he *bona fide* considers that he is carrying out the authority conferred upon him." We entirely

1. (1920) 89 L.J.P. C. 1.

agree with the learned Judge that, in the present case, the appellant cannot invoke this protective factor of *bona fides* to justify his conduct. The test is, as stressed by the learned Judge, whether the circumstances were such that the prosecution or act can only be accounted for by imputing *mala fides*, and that test is satisfied here, as the Officer knew the limits of the Rules, and must also have known that he was using his power against the plaintiff in a cruel and humuliating manner, not at all warranted by the actual contingency. We, hence, agree with the learned Judge in his view that this was a trespass upon person, *mala fide* and malicious, which entitled the victim to the recovery of damages.

The ground of limitation urged may now be briefly discussed. That is the ground upon which greater stress has been laid by learned Counsel for the appellant. Under section 53 of the Madras District Police Act XXIV of 1859.

"All actions and prosecutions against any person, which may be lawfully brought for anything done or intended to be done, under the provisions of this Act:.........shall be commenced within three months after the act complained of shall have been committed and not otherwise."

If this limitation is to apply, the claim is certainly time barred.

This matter was considered, at some length, and with reference to the correcponding Sections of English Acts upon which section 53 is worded, by Venkatasubba Rao, J, delivering the judgment on behalf of the Bench in *Lakshmanaswami* v. *Md. Galah Hussain*[1]. The learned Judge referred to several English decisions, and corresponding statutory provisions, and finally concluded that the protection given by section 53 will not apply to an act of this character. He said :

"If an act is done maliciously, upon the construction uniformly adopted, it ceases to be an act 'done or intended to be done under the provisions of the Act', and that construction is not in the least affected by there being a reference, in some section of the enactment, to malicious acts. The moment an act is shown to be malicious, it ceases to be protected by section 53...... "

There is a reference both to the language of section 53 and to the kind of situation to which that section might apply, in the decision of the Supreme Court in *State of Andhra Pradesh* v. *Venugopal*[2]. But there is nothing in that decision which touches upon this question of 'malice' discussed in the Bench decision of this Court earlier referred to, or upon the principle of exception enunciated in that decision. Their Lordships of the Supreme Court are clear that the protection of section 53 would include acts done or intended to be done under the provisions of the Police Act, and also acts done or intended to be done under the provisions of any other law conferring powers on the Police, such as the Code of Criminal Procedure. The protection is not available, where the act is outside this ambit altogether. The protection will extend to any case in which "the Police Officer or some other person may go beyond what is strictly justified in law". This itself implies that the protection is not available to a tort not contemplated by the law at all, such as confining an under-trial prisoner, who is further sick in Hospital Ward, by hand-cuffs and chain to a window-bar like a dangerous animal, on the ground or pretext that he might otherwise escape. We are, hence fully satisfied that the bar of limitation does not operate in the present case ; of course, we are not laying down any general principle, for obviously, each case will have to be decided upon its merits with regard to the extent to which it could be brought, even as an excess, under "some provision of law," or must be construed as outside any legal power altogether.

Indisputably, the quantum of damages awarded to the victim (plaintiff) by the learned Judge is very moderate and calls for no interference at our hands. Under the circumstances, the Letters Patent Appeal is dismissed with costs.

R.M. *Appeal dismissed.*

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1. I.L.R. (1937) Mad. 753 : (1937) 1 M.L.J. 580 : A.I.R. 1937 Mad. 382.
2. (1965) 2 S.C.J. 507 : (1965) 2 M.L.J. (S.C.) 87 : (1965) 2 An.W.R. (S.C.) 87: (1965) M.L.J. (Cri.) 749: (1964) S.C.R. 742: A.I.R. 1964 S.C. 33.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE K. SRINIVASAN AND MR. JUSTICE P. RAMAKRISHNAN.

R. Subramania Iyer and others .. *Petitioners**

v.

Thangammal .. *Respondent.*

Practice—Partition suit—Parties entering into compromise after the passing of a preliminary decree—Fresh preliminary decree in terms of the compromise—If can be passed.

A partition action comes to an end only when the final decree is passed and until then the partition action has to be deemed as pending. Consequently, when after the passing of a preliminary decree in a partition suit the parties enter into a compromise, it is open to them to request the Court to take this altered circumstance into consideration for the purpose of allotting shares to the parties at the stage of the final decree. If the compromise is found to be genuine and binding on the parties the Court is entitled to embody it in a set of fresh directions for the purpose of passing a final decree and the directions so issued should be construed as not an amendment to the preliminary decree already passed but rather as a fresh preliminary decree, which it is open to the Court dealing with a partition suit to pass at any time till the stage of passing the final decree is over.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to substitute the compromise arrived at between the parties and recorded by this High Court and made part of the order, dated 27th October, 1961, in Supreme Court Petition No. 66 of 1961, in lieu of the decree of the High Court, dated 7th May, 1960, passed in Appeal No. 563 of 1956, by passing a revised preliminary decree in terms of the compromise in the said Appeal No. 563 of 1956, preferred to the High Court against the decree of the Subordinate Judge of Salem passed in Original Suit No. 171 of 1954.

V. V. Raghavan and *T. S. Subramaniam*, for Petitioners.

R. Ramamurti Ayyar, for Respondent.

The Judgment of the Court was delivered by

Ramakrishnan, J.—In this petition, the petitioners allege that subsequent to the disposal of Appeal Suit No. 563 of 1956, by this Court, the parties have compromised the matter and they pray for the passing of a revised preliminary decree in terms of the compromise arrived at by them.

The prior facts, which will be necessary for a disposal of this petition, can be briefly put down. Petitioners 1 and 2, Subramania Iyer and Venkataramana Iyer and the husband of the respondent Thangammal were brothers. The respondent's husband died on 22nd July, 1952, without issue. On the allegation that one of the brothers Venkataramana Iyer was a congenitally deaf and dumb person, it was averred by Thangammal the plaintiff in the suit for partition out of which the appeal arose, that he would be disentitled to get any share. On this allegation the respondent Thangammal claimed partition and separate possession of one half-share. The suit was dismissed. She filed an appeal which came up before a Bench of this Court comprising of Balakrishna Ayyar and Jagadisan, JJ. (Appeal Suit No. 563 of 1956). This Court held that the second petitioner Venkataramana Iyer would be entitled to a share and decreed the suit for partition and separate possession of 1/3rd share in favour of the plaintiff. There was petition for leave to appeal to the Supreme Court filed by the defendants in the suit. It was contested by the plaintiff. A report was called for from the Subordinate Judge, Salem, regarding valuation. The learned Subordinate Judge sent a report on 6th September, 1961, stating that the parties had compromised the matter. On 27th October, 1961, a Bench of this Court, to which one of us was a party, referred to the report of the learned Subordinate Judge that since the parties had compromised, it was not necessary to lead evidence regarding the value of the properties, for the purpose of granting leave to appeal to the Supreme Court, and thereupon dismissed the petition for leave to appeal to the Supreme Court. Thereafter, the present petition has been filed for passing a revised preliminary

* Civil M.P. No. 2097 of 1964 (App. No. 563 of 1956). 3rd April, 1964.

decree in terms of the compromise, by the petitioners, who are the defendants in the suit and respondents in the appeal.

In the counter-affidavit to this application filed by the respondent-plaintiff two contentions were put forward. The first one was that the compromise was obtained by deceit and false representation and would not bind the respondent. The petition was also opposed on a second ground which is a legal one. It was alleged that this Court in the appeal above mentioned has passed a preliminary decree and thereafter it was not open to the parties to apply to the Court to set aside the decree and substitute another preliminary decree in its place. This Court, so far as the preliminary decree is concerned, is *functus officio* and there is no proceeding before it. Even the consent of the parties would not give it jurisdiction to revise the preliminary decree already passed.

In regard to the last-mentioned plea, there is ample authority for the view that a partition action comes to an end, only when the final decree is passed, and until then, the partition action has to be deemed as pending. A Bench of the Calcutta High Court in *Jotindra Mohan Tagore* v. *Bejoy Chand Mahatap*[1], held that a suit for partition even when the report of the Commissioners is confirmed and a decree is directed to be drawn in accordance therewith, is a pending litigation until the Court signs the final decree. A Full Bench of this Court in *Basavayya* v. *Guravayya*[2], after referring to various authorities, observed at page 185 of the report :

> "A partition suit in which a preliminary decree has been passed is still a pending suit and the rights of the parties have to be adjusted as on the date of the final decree..........In such a suit the Court has not only to divide the common properties but has also to adjust the equities arising between the parties out of their relation to the common property, the property to be divided. The preliminary decree determines the moieties of the respective parties and thereby furnishes the basis upon which the division of the property has to be made..........Even after the passing of the preliminary decree it is open to the Court to give appropriate directions regarding all or any of these matters either *suo motu* or on the application of the parties."

Matters thus referred to in the above case are realisation of common outstandings, the discharge of common liabilities, the distribution of the profits of the properties realised pending the suit, either in cash or by allotment of property of the requisite value, the grant of owelty, the allotment of lands on which improvements have been effected to the sharer who has improved them, the allotment of alienated lands to the share of the alienor and other similar matters. The Full Bench dealt with a case where a preliminary decree was silent regarding mesne profits, and the question arose whether a direction could be given for the purpose, after the passing of the preliminary decree. The Full Bench also observed (at page 178) :

> "Ordinarily there would be one preliminary and one final decree............there is nothing in the Civil Procedure Code which can be construed as a prohibition against the Court, in a proper case, passing more than one preliminary decree and one final executable decree in a suit."

The Court also relied upon the observation of Sadasiva Aiyar, J., in *Ramaswami Aiyar* v. *Subramania Aiyar*[3]:

> "In all adjudications, which are not intended to be the determinations of some of the questions involved in a suit, there is and ought always to be implied the reservation of leave to all parties to apply for further directions and adjudications necessary for the complete trial and complete disposal of the litigation."

In the present case, the preliminary decree directed partition and separate possession of 1/3rd share in favour of the plaintiff in the plaint 'B' and 'C' schedule properties. The terms of the alleged compromise can now be briefly referred to. The compromise provides that out of the properties to be divided, some particular items were to be given to defendants 1 and 2, and the plaintiff was to be given a sum of money in lieu thereof and the remaining properties were to be divided into three shares as provided in the preliminary decree. In substance, this compromise amounts only to subsequent agreement between the parties regarding the manner in which the preliminary decree for division had to be worked out. For their own convenience they provided that in lieu of a particular item of property being brought

1. (1904) I.L.R. 32 Cal. 483.
2. I.L.R. (1952) Mad. 173 (185): (1951) 2 M.L.J. 176 (F.B.).
3. (1922) 43 M.L.J. 406 (412).

into the hotchpot it shall be allotted to two of the sharers with a money compensation in lieu thereof payable to the other sharer ; some properties and mesne profits were to be given up ; the rest of the properties were to be divided as provided in the preliminary decree. One can visualise a case where, after the passing of the preliminary decree, an item of property is lost for the purpose of division, say by the intervention of land acquisition proceedings by the Government, or loss by fire in the case of a house property or by diluvian in the case of cultivable land. To insist in such cases that the original preliminary decree alone shall be enforced and a final decree shall be passed only in accordance with that preliminary decree, will certainly not be conducive to the doing of justice between the parties. The Court has necessarily to take into account the altered situation and if necessary pass a further preliminary decree taking that new situation into account for adjusting the shares of the parties in the remaining properties. What is alleged to have happened in this case is a compromise, entered into after the passing of the preliminary decree, and which has a vital bearing upon the allotment of the properties among the sharers. It is certainly open to the parties to request the Court to take this altered circumstance into consideration for the purpose of allotting shares to the parties at the stage of the final decree. When the Court is called upon to take compromise into account and give directions in accordance with the compromise for the purpose of passing a final decree, the Court cannot be considered as revising its earlier preliminary decree, but it will be really passing a fresh preliminary decree, taking into consideration subsequent developments. According to the decisions cited at the Bar and which have been referred to above the Court is certainly entitled to adopt such a course.

The decisions contra, cited by the respondent's Counsel, *Kotaghiri Venkata Subbamma Rao* v. *Vellanki Venkatarama Rao*[1], and *Somasundaram Chetty* v. *Subramanian Chetty*[2], state the broad proposition that once a decree has been passed by a Court, it has no jurisdiction to alter it except in the case where an accidental slip or omission has arisen. They do not deal with partition suits. The principle laid down is a well-recognised one, but it has no bearing on a partition suit, in which more than one preliminary decree can be passed. Such a suit must be deemed to be pending till the final decree is passed.

We are, therefore, of the opinion that the Court is competent to take into account the matters set out in the compromise ; if the compromise is found to be genuine and binding on the parties the Court is entitled to embody it in a set of fresh directions for the purpose of passing a final decree, and the directions so issued should be construed as not an amendment to the preliminary decree already passed but rather as a fresh preliminary decree, which it is open to the Court, dealing with a partition suit to pass at any time till the stage of passing the final decree is over. Instead of ourselves dealing with this matter about the validity of the compromise and the necessity to pass a revised preliminary decree in accordance therewith, if its validity is established, we direct the trial Court to deal with it. If it is satisfied on enquiry that there has been a valid compromise it is open to the trial Court, to issue appropriate directions in the form of a fresh preliminary decree. The petition is allowed as above. The petitioner will get the costs of this petition from the respondents.

V.K *Petition allowed.*

1. 10 M.L.J. 221 : L.R. 27 I.A. 197 : I.L.R. 24 Mad. 1 (P.C.).
2. (1927) 25 L.W. 163.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

V. R. Varadarajulu Chettiar .. *Appellant**

v.

Muthukannu Ammal and another .. *Respondents.*

Easements Act (V of 1882), sections 38 and 47—Extinguishment of easements—Right of access over adjoining strip of land to carry out repairs to property—Conduct of parties—If could extinguish the right.

Section 38 of the Indian Easements Act provides for extinguishment of easements by release, express or implied. Section 47 relates to cases of extinguishment by non-enjoyment. Though non-enjoyment as such, standing by itself, may not amount to an implied release, an equitable release of easement right can be presumed in cases where the dominant owner by his acts or omissions caused a reasonable belief in the mind of the servient owner that he intends abandoning altogether the enjoyment of his easement and encourages the servient owner incurring expenses in putting up permanent structures. The presumption gets strengthened if it is established that the non-user of the easement right is a result of adverse acts of the servient owner and such acts had been acquiesced in by the dominant owner. Such release could also be of a part of the right. If in spite of the permanent structures put up by the servient owner and acquiesced in by the dominant owner if there are accessible portions, it can be held that there is no extinguishment of the easement to that limited extent. Where the right of easement is only over the vacant site, in cases where structures have been put up on the site, the limited right aforesaid will not give a right to go over the buildings which have been put up. But mere flooring the area will not be deemed an obstruction. In such cases the Court could ascertain to what extent the easement has not been extinguished and could still be enjoyed.

Appeal against the Decree of the District Court of Tiruchirappalli in Appeal Suit No. 617 of 1959 preferred against the Decree of the Court of the District Munsif of Tiruchirappalli in Original Suit No. 795 of 1957.

A. Sundaram Ayyar, for Appellant.

K. Sarvabhauman and *R. Gangadharan*, for Respondents.

The Court delivered the following

JUDGMENT.—The plaintiff who has lost in both the Ccourts below in the suit filed by him for a declaration that a strip of land should be kept vacant as a common lane for repairs and for consequential relief of mandatory injunction for the removal of a staircase which had been built thereon and of a trough, some iron hooks, etc., is the appellant in this Second Appeal. There was also a prayer for a declaration of the plaintiff's ownership of a wall shown as *A B C* in the plaint plan. So far as the ownership of the wall is concerned, there was no serious contest about it and the Courts below have upheld the plaintiff's claim in respect of the wall. This Second Appeal relates only to the other reliefs claimed by the plaintiff with reference to rights over the site *A B C C1 B1 A1* in the plaint plan.

A perusal of the judgment of the Courts below shows that the plaintiff has put forward a case far reliable to a larger extent than the easement rights he may be legally entitled to and appears to have asserted more or less a claim of a ownership in the site in question. This has been negatived by the Courts below. The structures in question have been found to be existing for over 15 to 20 years. A wall *B B1* was contended to be an encroachment and certain iron hooks and wooden rafters were urged to be hindrances to the enjoyment of the site as a common lane. Relief for the removal of all these things was refused by the Courts below and learned Counsel for the appellant has not been able to make out a case for differing from the conclusions of the Courts below in regard to these.

The plaintiff had purchased the property shown as *A C D E F H* in the plan under Exhibit A-1 on 15th September, 1936. By Exhibit A-2 dated 1st October, 1936 he sold the eastern portion of this property demarcated as *A C F H* to Ponnammal, predecessor in title of the defendants. A reference to Exhibits A-1 and A-2 shows that there is a provision for retaining an extent of property about 1¼ feet wide on the southern side of *A C F H* of the length of 16 feet north to south, that is,

* Second Appeal No. 217 of 1962. 16th April, 1965

the strip marked *A B C C1 A1* in the plaint plan as a vacant site for purposes of carrying out repairs to the property south and west of the property conveyed under Exhibit A-2. Subsequent to the sale under Exhibit A-2, whereby the provision was shown for retaining this strip as a vacant site for carrying out repairs to the adjoining property, there was a suit O.S. No. 711 of 1937 on the file of the District Munsif, Tiruchirappalli between plaintiff and Ponnammal, the vendee under Exhibit A-2. That suit was compromised and a perusal of the compromise decree shows that the rights provided for access over the site *A A1 C1 C* for repairs had become extinguished with reference to the site *C D E F* of which the plaintiff was then owner. In view of the walls put up under the terms of the compromise, the right had become impossible of enjoyment. Subsequently the plaintiff became the purchaser of the property south of *A C F H*, that is the property *A L K J* under the sale deed Exhibit A-3 dated 21st May, 1956. The plaintiff claims now that even though he might have lost his right for use of the strip of land *A C C1 A1* with reference to the property *C D E F*, he could as owner of *A L K J* claim the said right. It is in pursuance of this claim to go over the strip of land for repairs to the southern property, the right has been asserted in these proceedings and a mandatory injunction claimed for removal of the structures and fixtures, which would be an obstruction to the free enjoyment of the said right.

No doubt the plaintiff may not be precluded by virtue of the decree Exhibit B-4 only to assert rights appertaining to the property *A L K J*. But if all the while and through the years the defendants had been putting up permanent constructions on the strip of land *A C C1 A1* and incurring expenditure in the construction and the constructions are such that would make the enjoyment of any right over the strip as appertaining to *A L K J* impossible, and if all the while the owner of *A L K J* had stood by and acquiesced in the defendants or their predecessors in title incurring expenditure, then it would be a case of an estoppel arising precluding the owner of *A L K J* asserting his rights to their detriment. For the plaintiff reliance is placed upon Exhibit A-22, a receipt which Ponnammal, the predecessor in title of the defendants, had executed in favour of Mohammed Baksha Sahib, the then owner of the southern property *A L K J*. Under this, while there is a provision for Ponnammal seeking support for some constructions in the wall belonging to the southern owner, Ponnammal acknowledges that without any objection she would give access to the southern owner for repairs. This document comes in after the decree in O.S. No. 711 of 1937 above referred to between the present plaintiff and Ponnammal. This makes it clear that the right of access over the strip of land to the extent possible as far as the southern property was concerned was preserved and kept alive. But the evidence shows that this Ponnammal had several years before the plaintiff became the purchaser of the southern property put up the impugned constructions, staircase, trough, etc.

Now the site was not shown retained as a common lane even in Exhibit A-22. Only access for repairs had been provided. But subsequently structures appear to have been erected thereon. There can be no doubt that, as found by the Courts below, the ownership of the strip of land was itself intended to be conveyed to Ponnammal and had been conveyed to her. What was retained and provided for was easement right of access over the strip of land for the purpose of repairs to the adjoining properties. So far as the western property retained by the plaintiff is concerned, this right has been lost and had got extinguished under the compromise in the earlier suit. The only question is whether and if so to what extent there has been extinguishment of the easement rights over this strip of land in relation to the southern property of which the plaintiff became the owner in 1956.

Section 38 of the Easements Act provides for extinguishment of easement right by release, the dominant owner releasing it, expressly or impliedly, to the servient owner. Such release can be made only in the circumstances and to the extent to which the dominant owner can alienate the dominant heritage. An easement may be released as to part only of the servient heritage. It is clear therefore that with reference to the southern property of which the plaintiff was not the owner at the time

of the compromise decree there can be no extinguishment by reason of the decree. He was not then the dominant owner of the southern property. The *Explanation* to section 38 provides how an implied release is effected. It is released either where the dominant owner expressly authorises an act of a permanent nature to be done on the servient heritage, the necessary consequence of which is to prevent his future enjoyment of the easement, and such act is done in pursuance of such authority or when any permanent alteration is made in the dominant heritage of such a nature as to show that the dominant owner intended to cease to enjoy the easement in future. The section provides that mere non-user of an easement is not an implied release within the meaning of this section. Extinction of easement by non-enjoyment is provided under section 47 and a discontinuous easement like the present one would get extinguished when for an unbroken period of 20 years it had not been enjoyed as such.

Now with reference to the property *A L K J* neither of the provisions above referred to apply and extinguish the easement. Exhibit A-62, while providing for the user of the site, preserves the right of access for the purpose of repairs. All the same there is another principle which can preclude the assertion of the right of easement and that is the principle of estoppel by conduct referred to at the outset. It is clear from the evidence on record that the right has never been exercised by the dominant owner all these years. Though no doubt mere non-user standing by itself will not amount to an implied release, an equitable release of easement right can be presumed in cases where the dominant owner by his omissions or acts caused a reasonable belief in the mind of the servient owner that he intends abandoning altogether the enjoyment of his easement and encourages the servient owner incurring expenses on that belief on permanent structures. This presumption gets strengthened if it is established that the non-user was the result of adverse acts of the servient owner which had been acquiesced in by the dominant owner. When a servient owner raises a permanent structure expending money, which interferes, with or would interfere with the enjoyment of an easement, without protest or resistance on the part of the dominant owner, then one can presume, if the circumstances warrant it, that the dominant owner was a consenting party to the structures. In this case the finding is that the staircase, trough and pipes were in existence on the suit lane for over 15 years, prior to suit. The easement rights are the subject of covenant and still, no steps had been taken by the plaintiff or by the southern owner for the removal of these constructions. The learned appellate Judge observes that the plaintiff has by his own conduct absolved the defendants' predecessor-in-title from keeping it as a common maramat lane and that he is estopped from claiming that right again.

But the unfortunate thing with reference, to the findings of the Courts below is that for having access for repairs, it is not necessary that the lane should be kept as a common lane. It is the plaintiff's approach to the case as if the lane is a common lane that evidently has led to the Courts treating the claim of the plaintiff as one of a right in property. The question for consideration is not whether the property could be still enjoyed as a common lane and whether a mandatory injunction should be issued at the behest of the plaintiff for maintaining it as a common lane but whether the plaintiff, as the present owner of the southern property, can exercise any rights of easement for the purpose of repairs in respect of the southern property. As indicated in section 38 itself, there can be release of an easement in part only of the servient heritage. If in spite of the constructions that have been put up, the plaintiff could still go over the limited space of 1¼ feet in width which had been provided for and carry out repairs to the southern property, I do not see what objection the defendants can raise to such a course. The suit has been filed within 20 years of Exhibit A-22. Therefore, the easement right to the extent it has not been extinguished by acquiescence in constructions must be deemed to be alive. Of course, the plaintiff and his predecessor-in-title having stood by when portions of the strip of land were being built upon or fixtures were permanently put thereon cannot now object, to the presence of these constructions and fixtures. If, in spite of these constructions and fixtures, repairs could be carried out to the southern property, it must be held that there has been no extinguishment of the easement to that limited extent. But the

plaintiff cannot claim a right to go over the buildings which might have been put up on the property to carry on repairs to his southern property. The easement right reserved was only over the vacant site in question. If it had been built upon and the plaintiff is not entitled to a mandatory injunction for their removal the plaintiff cannot claim any right to go over the buildings for carrying on his repairs. Of course merely flooring the area will not be an obstruction. In this connection reference may be made to the decision of this Court in *Namalammal* v. *Chakravarthi*[1], where it has been noticed that a house owner who may have an easement in the nature of a necessary easement to go to the other side of the wall on the land of his neighbour for repairs to his own wall on his neighbour's side cannot seek access through a staircase to the open terrace of his neighbour's house that he may effect repairs to his wall and the windows on that wall.

On the materials before the Court after taking time more than once Counsel have not been able to come to an understanding as to the extent of access that would be available at present on the strip of land in question over which originally a right of access was reserved for repairs. There is also this fact that the wall *G B* had been built running north to south cutting the strip of land in the middle by the wall *B B*1. The Courts below have on proper considerations refused mandatory injunction for the removal of the wall, *B B*1. If that be so, I do not see how the plaintiff can claim to go further west of *B B*1 to effect repairs on the portion of the wall *B C*. The Commissioner also finds that the entire part on *B*1 *A*1 *A B* has been constructed. What that construction is, is not clear. If the constructions would make the enjoyment of the right of easement absolutely impossible then certainly he can have no relief whatsoever of access over the property for repairs. If despite the constructions there are accessible portions of the strip the Court can grant him relief to that limited extent. In spite of the constructions it is stated for the plaintiff that it may be possible for him to a limited extent to enjoy right of access for repairs. This is a matter that has to be ascertained afresh and appropriate orders passed. The right being only for purposes of repairs it can only be periodical and the right of access must be limited to the necessary period and for the specific purpose of repairs.

I think that in the circumstances of this case the proper thing to do would be, while confirming the dismissal of the suit so far as the claim for mandatory injunction is concerned, to remit the matter back to the lower appellate Court for ascertaining whether, and if so to what extent, the easement right has not been extinguished and could still be enjoyed. The lower appellate Court may appoint a Commissioner for the said purpose, and if need be and the parties so desire, examine the Commissioner in Court. If it is found that the right could still be enjoyed, the Court will have to pass a decree declaring the right limiting the duration of the access. It may be required only for a day or two or three in a year, as the case may be, dependant on the extent of the repairs and during the hours when workmen need to go on the servient tenement to carry out the repairs. Suitable directions in regard to these may have to be given, the plaintiff by adequate advance notice fixing up the day and the hour in consultation with the defendant or defendants as the case may be.

In the result, while confirming the decree declaring the plaintiff's right to the wall *A B C* and dismissing the suit in respect of the claim for mandatory injunction, the rest of the decree dismissing the suit in its entirety is set aside and the matter remitted to the lower appellate Court for disposal in the light of the observations contained herein. There will be no order as to costs in the Second Appeal.

Leave refused.

R.M. *Order accordingly.*

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1. (1964) 2 M.L.J. 241.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. RAMAKRISHNAN AND MR. JUSTICE K. S. RAMAMURTI.

State of Madras, represented by the Commissioner of Agricultural Income-tax ... *Petitioner**

v.

Thiru Arooran Sugars, Limited .. *Respondent.*

Madras Agricultural Income-tax Act (V of 1955), sections 5 (e) and 5 (k)—Agricultural income—Allowances—Lands purchased for cane cultivation—Interest on unpaid purchase price—Head of allowance—Whether interest on borrowed capital or expenditure for purposes of the land.

The assessee purchased a large extent of lands for cultivation of sugarcane, but, there was a balance of purchase-money due to be paid. In the computation of the agricultural income from the lands, deduction was claimed for (i) interest paid on the unpaid purchase-money and (ii) interest paid on moneys borrowed for expenses incurred while carrying on agricultural operations and manufacture of sugar, like, establishment of office, maintenance of oil engine and pumpset, and tractor, pumpset hire charges, lease, consumption of stores, loss in agricultural implements, etc. The Tribunal allowed the deduction in respect of the two items under section 5 (e) of the Act. The State contended that the expenses are allowable only under section 5 (k) of the Act, under which there is a ceiling limit as regards the quantum of expenses as well as the rate of interest allowable if loans are raised for providing for those expenses. In a Revision to the High Court,

Held, that the interest paid on the unpaid purchase-money in respect of the lands bought for the purpose of the business is an allowable deduction under section 5 (e) of the Act.

There is a clear distinction, between moneys borrowed for expenses wholly and exclusively for the purposes of the land and moneys borrowed and actually spent on the land.

In order to fall under section 5 (k) of the Act, the money borrowed should have been actually spent on the land, and it is not enough that the money was spent for the purpose of the land in connection with the business activities of the assessee which resulted in the earning of the agricultural income.

It is for the State to establish that particular items represent moneys actually spent on the land so as to take out any portion of those items from the scope of section 5 (e).

Salaries and wages for establishment and executive office, tractor maintenance, oil engine and pumpset maintenance, tractor and pumpset hire charges, repairs to buildings, repairs to road, contribution to local development scheme, expenditure on temporary structure, travelling and postage, etc., cannot be expenses incurred or spent on the land. All these items are allowable deductions only under section 5 (e) of the Act.

Petition under section 54 (1) of the Agricultural Income-tax Act praying the High Court to revise the Order of the Agricultural Income-tax Appellate Tribunal, Madras-2, dated 24th April, 1963, and made in A.T.A. No. 154 of 1962, against the order of the Assistant Commissioner (Agricultural Income-tax), Thanjavur, relating to the assessment year 1958-59 in his Appeal No. 295 of 1961, dated 6th October, 1962.

G. Ramanujam for Government Pleader (*A. Alagiriswami*), for Petitioner.

S. Swaminathan and *K. Ramagopal*, for Respondent.

The Order of the Court was made by

Ramamurti, J.—The State has preferred this Revision Petition against the order of the Tribunal, allowing certain deductions under section 5 (*e*) and section 5 (*k*) of the Madras Agricultural Income-tax Act.

The assessee is Thiru Arooran Sugar Mills, Ltd., and the assessment relates to the year 1958-59. The dispute in the revision case relates to two categories of deductions: (*a*) interest paid by the assessee in respect of the balance of the purchase consideration due by the assessee; (*b*) interest paid on moneys borrowed for expenses incurred by the assessee while carrying on its business, *i.e.*, agricultural operations and manufacture of sugar. There is no dispute about other items. The assessee for the purposes of his business had purchased large extent of lands for raising sugarcane for about rupees 58 lakhs out of which after payments so far made there is a balance of about Rs. 21 lakhs carrying interest at six per cent. The assessee claimed a deduction of a sum of Rs. 1,22,520 towards interest paid on the unpaid purchase-money aforesaid. The Tribunal upheld this claim following the Bench decision

* T.C. Petn. No. 169 of 1963. 26th August, 1964.

of this Court in *Coelho* v. *State of Madras*[1]. In that case the assessee had borrowed money for purchasing an estate consisting of tea, coffee and rubber plantations in Nilgiris, Madras State. The Bench held that the loan which was utilised and spent for acquiring the plantations was wholly and exclusively for the purpose of the source of income of the assessee, and that the payment of interest on the amount so borrowed was an allowable deduction under section 5 (*e*) of the Act. The matter went in appeal to the Supreme Court and in *State of Madras* v. *G.J. Coelho*[2], the Bench decision of the Madras High Court was affirmed. In view of this, the State cannot resist the claim of the assessee for deduction under section 5 (*e*).

In respect of the other expenses incurred by the assessee while carrying on its business of agricultural operations and the manufacture of sugar the Tribunal held that certain expenses would be governed by section 5 (*k*) under which there is a ceiling limit as regards the quantum of expenses as well as the rate of interest allowable if loans are raised for providing for those expenses. In respect of certain other items of expenditure, the Tribunal held that they would come under section 5 (*e*), and that the assessee would be entitled to deduction of the entire interest paid on the loans borrowed by the assessee for meeting those expenses. For convenient reference of the allocation made by the Tribunal the following statement of account contained in page 7 of the typed papers supplied by the assessee may be extracted :—

Extract of allocation shown in the judgment.

Item (a)		*Item (b)*	
Tribunal allowed the claim under section 5 (*k*).		Tribunal allowed the claim under section 5 (*e*).	
Cultivation, labour, etc., expenses about.		*Salaries and wages about.*	
	Rs.		*Rs.*
Labour, etc., included in the cost of cultivation	7,91,323	Establishment of executive of office, etc.	2,75,022
Plant protection	464	Tractor and maintenance	28,341
Wages and labour charges	798	Oil engine and pump-set maintenance	5,399
Cane harvesting expenses	2,17,829	Tractor and pump-set hire charges	40,951
Land revenue and water charges	2,46,278	Lease	3,91,021
Consumption of stores—			
Cost of cane seed and manures included in the cost of cultivation.	6,40,965	Consumption of stores— Loss on agricultural implements	6,875
	18,97,657		7,57,609

There is no revision by the assessee against the view taken by the Tribunal that the various expenses mentioned in item (*a*) would be governed by section 5 (*k*). The only dispute now raised by the State is that the expenses under item (*b*) which has been allowed by the Tribunal under section 5 (*e*) would really come under section 5 (*k*), and that the Tribunal is wrong in upholding the claim for deduction under section 5 (*e*). Section 5 which deals with the computation of agricultural income provides for certain allowances and deductions. Section 5 (*e*), one of the deductions allowed, runs as follows :—

" The agricultural income of a person shall be computed after making the following deductions namely :—

(*e*) any expenditure incurred in the previous year (not being in the nature of capital expenditure or personal expenses of the assessee) laid out or expended wholly and exclusively for the purpose of the plantation (land)."

Section 5 (*k*) is on these terms :

* * * * * *

" any interest paid in the previous year on any amount borrowed and actually spent on the plantation (land) from which the agricultural income is derived."

1. I.L.R. (1960) Mad. 873.
2. (1964) 2 I.T.J. 215 : (1964) 2 S.C.J. 400.

In the decision, *Coelho* v. *State of Madras*[1], referred to earlier, the Bench has taken the view that section 5 (*e*) is the general provision and that section 5 (*k*) is a special provision, and that if section 5 (*k*) applies to certain interest charges, the application of section 5 (*e*) would be excluded even if all the statutory requirements of section 5 (*e*) are satisfied, on the ground that the express statutory provision of special application like section 5 (*k*) would exclude the operation of another provision like section 5 (*e*) which is general in its scope.

The Supreme Court, while affirming the decision of the Madras High Court put the matter thus :

"Applying the above principles to the facts of this case, it seems to us that it is impossible to dissociate the character of the assessee as the owner of the plantation and as a person working the plantation. The assessee had bought the plantation for working it as a plantation, *i.e.*, for growing tea, coffee and rubber. The payment of interest on the amount borrowed for the purchase of the plantation when the whole transaction of purchase and the working of the plantation is viewed as an integrated whole, is so closely related to the plantation that the expenditure can be said to be laid out or expended wholly and exclusively for the purpose of the plantation. In this connection, it is pertinent to note that what the Act purports to tax is agricultural income and not agricultural receipts. From the agricultural receipts must be deducted all expenses which in ordinary commercial accounting must be debited against the receipts. There is nothing in the Act which prohibits such expenses from being deducted. No farmer would treat interest paid on capital borrowed for the purchase of the plantation as anything but expenses, and as long as the deductions he claims, apart from any statutory prohibition, can be fairly said to lead to the determination of the true net agricultural income, these must be allowed under the Act. In principle, we do not see any distinction between interest paid on capital borrowed for the acquisition of a plantation and interest paid on capital borrowed for the purpose of existing plantations : both are for the purpose of the plantation."

According to the judgment of the Supreme Court there is no difference between moneys borrowed for the purchase of plantation and moneys borrowed for the purpose of working the existing plantation, and that both would be for the purposes of the plantation, or expended wholly and exclusively for the purpose of the land. It may be noticed that the Supreme Court decided the case on the ground that the money borrowed was wholly and exclusively for the purpose of the land and did not advert to this aspect, *i.e.*, the general provision in section 5 (*e*) being excluded by the special provision in section 5 (*k*).

The question is whether the particular loans borrowed would amount to *moneys borrowed and actually spent on the land* from which agricultural income is derived within the meaning of section 5 (*k*). Looking at the several sub-clauses of section 5 we find that in section 5 (*d*) the Legislature has used the words *was purchased or constructed for the benefit of the land* from which the agricultural income is derived. In section 5 (*e*) the words used are *expenses laid out or expended solely or exclusively for the purposes of the land.* In section 5 (*k*) the words used are *any amount borrowed and actually spent on the land.* There is a clear distinction between moneys borrowed for expenses wholly and exclusively for the purposes of the land and moneys borrowed and actually spent on the land.

In *Coelho* v. *State of Madras*[1], the distinction between section 5 (*e*) and section 5 (*k*) was pointed out in these terms :

"Independent of the capital nature of the expenditure incurred when the estate was purchased by the petitioner, we are clearly of opinion that the payment of interest charges in the year of account did not fall within the scope of section 5 (*k*). What section 5 (*k*) requires is that the borrowed amount should have been actually spent on the land. When the petitioner used the money he had borrowed for the purchase of the land itself, it is difficult to look upon it as an expenditure on the land within the scope of section 5 (*k*). No portion of that borrowed money was spent on the land itself, for example, for any agricultural or horticultural purposes or any purpose subservient thereto. The expenditure for the purchase of the land is not in our opinion, an expenditure on the land, as we understand the scope of that expression in section 5 (*k*) of Act V of 1955."

From this it is clear that for section 5 (*k*) to apply the money borrowed should have been actually *spent on the land,* and it is not enough that the money was spent for the purpose of the land in connection with the business activities of the assessee which resulted in the earning of the agricultural income. It is for the State

1. I.L.R. (1960) Mad. 873, 875.

to establish that particular items represent moneys actually spent on the land so as to take out any portion of those items from the scope of section 5 (*e*). When we examine the items allowed by the Tribunal under section 5 (*e*) it is impossible to regard anyone of these items as money spent on the land. In our opinion, it is impossible, to argue contra, and the view taken by the Tribunal is perfectly correct. Salaries and wages for establishment and executive office, tractor maintenance, oil engine and pumpset maintenance, tractor and pumpset hire charges and repairs to buildings, repairs to road, contribution to local development scheme, expenditure on temporary structure, travelling and postage cannot possibly be contended as items of expenditure incurred or spent on the land. In respect of a sum of Rs. 3,91,021 representing expenses incurred in connection with the lease of lands the learned Government Pleader did not contend that it would not come under section 5 (*e*). As none of the items would come under section 5 (*k*), it is unnecessary in this case to define the demarcating line between the scope of the expenses under section 5 (*e*) and section 5 (*k*). It may be, that in a particular case there may be difficulty in determining whether a particular expense is for the purposes of the land or is expenditure spent on the land. As observed earlier there is no such problem in the instant case and we are clear that everyone of the items now in dispute would come only under section 5 (*e*).

Our attention was drawn to the provisions of the Kerala Agricultural Income-tax Act, as well as the Mysore Agricultural Income-tax Act. Even though the main scheme as well as the claim for deduction under the three enactments appears to be of the same pattern, we find that the classification of the heads of allowances and deductions in the other two enactments is more detailed, and is not of much assistance in determining the relative scope of section 5 (*e*) and section 5 (*k*) of the Madras Act.

The revision petition is dismissed, but no costs.

V.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

T. K. Ramanujam Pillai .. *Appellant**

v.

Sri Alagiamannar Rajagopalaswami Deity, Palayamkottai, through its Trustee Sri T. M. Subramaniam and another .. *Respondents.*

Civil Procedure Code (V of 1908), section 102—No Second Appeal in a case of small cause nature—Allegations in the plaint—Decisive of the nature of the suit—Conversion of Second Appeal into a Revision Petition—Discretion of Court.

When the general trustee of the temple took proceedings under section 87 of the Hindu Religious and Charitable Endowments Act of 1951, the defendants covenanted to put the temple land to best use and pay certain amounts to the temple. The suit filed by the plaintiff for recovery of sums (about one thousand rupees) on the basis of the covenant was decreed by the lower Courts.

Held, the suit is of a small cause nature and no Second Appeal will lie. The character of the suit has to be determined only by reference to the allegations in the plaint. The claim is based on the failure of the defendants to pay according to the terms of the contract and is cognizable by a Court of Small Causes. The claim is not for rent, nor one for specific performance.

The Second Appeal was refused to be converted into a Revision Petition by the Court in the exercise of its discretion.

Appeal against the Decree of the Court of the Additional District Judge, Tirunelveli in Appeal Suit No. 80 of 1961, preferred against the Decree of the Court of the District Munsif of Tirunelveli in Original Suit No. 472 of 1960.

R. Gopalaswami Ayyangar, for Appellant.

D. Ramaswami Ayyangar, for Respondent.

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* Second Appeal No. 205 of 1962. 16th April, 1965.

The Court delivered the following

JUDGMENT.—This Second Appeal has been preferred by the 2nd defendant in a suit for recovery of a sum of Rs. 980 against the defendants, by the 1st respondent as the general trustee of a temple. The basis of the suit is a joint memo. which the 2nd defendant and the 1st defendant by his mother as guardian, the defendants acting through their Counsel filed, the other party to the memorandum being the general trustee of the temple the memo. being filed on an application under section 87 of the Hindu Religious and Charitable Endowments Act, 1951. Under the compromise memorandum, the defendants had covenanted to put 70 cents of the Nandavanam poramboke land, which they were alleged to have unlawfully converted into wet land, to the best use and pay whatever income was realised therefrom to the general trustee of the temple with the sanction of the Deputy Commissioner for Hindu Religious and Charitable Endowments. The allegation in the plaint is that the defendants had failed to pay the amounts as covenanted in spite of sanction having been obtained. The suit was originally filed in the Sub-Court, Tirunelveli as a small cause suit and later by an administrative order transferred to the District Munsif's Court, Tirunelveli where it was tried as an Original Suit. The trial Court granted a decree against both the defendants, the principal contention of the 1st defendant, who was a minor at the relevant time, being that he was not bound by the compromise. Various defences had been raised on behalf of the 2nd defendant questioning the validity of the compromise, the authority of his Counsel to enter into compromise and the character and nature of the memorandum of compromise. It was impugned as invalid and beyond the powers of the trustees. He claimed to be the special trustee and it is contended that the compromise could not be valid in the circumstances and on its terms. The Courts below have not gone into the question of title set up by the parties to the Nandavanam poramboke land. The trial Court, as stated already, decreed the suit against both the defendants but limited the period for which the profits could be claimed. There was an appeal and the lower appellate Court has allowed the appeal so far as the 1st defendant is concerned. He has been completely exonerated from liability. The appeal so far as the 2nd defendant was concerned was dismissed. A memorandum of cross-objections was filed by the plaintiff in the lower appellate Court in respect of the period for which profits had been disallowed and this was allowed by the lower appellate Court with costs.

In this Second Appeal before me, learned Counsel appearing for the 2nd defendant-appellant has raised various contentions some of which do not appear to have been raised in the Courts below. The jurisdiction of the Court to entertain the suit is questioned. It is contended that the compromise as such is not enforceable. It is argued that the plaintiff will not be entitled to claim the entire income as such. It is pointed out that the lower appellate Court erred in its view that the plaintiff could get a decree for the entire period and not for a period of three years prior to the suit as decreed by the trial Court. So far as this point is concerned, there can be no doubt about its maintainability because the cause of action is the failure to pay and the fact that the sanction of the Deputy Commissioner may be necessary will not extend the period of limitation as viewed by the lower Court.

A preliminary objection was taken by the learned Counsel for the plaintiff Mr. D. Ramaswami Ayyangar. It is pointed out that the suit is of a small cause nature and the Second Appeal is not competent. Mr. Gopalaswami Ayyangar contends that in the circumstances of the case and in view of the questions that properly had to be decided in the suit the suit is not of a small cause nature. But the character of the suit has to be determined only by reference to the allegations in the plaint and the contention put forward by the defendant cannot alter the nature of the plaint. Section 102, Civil Procedure Code, prohibits a Second Appeal in any suit of the nature cognisable by Courts of Small Causes. On the allegations in the plaint, the claim in my view, is based on the failure of the defendants to pay according to the terms of the contract and is cognisable by a Court of Small Causes. The claim is not for rent, nor one for specific performance as suggested by the Counsel for the appellant. The suit is of a Small Cause nature and so the Second Appeal is not tenable.

Mr. Gopalaswami Ayyengar for the appellant makes an oral application that the Second Appeal may be converted into a Civil Revision Petition under section 115, Civil Procedure Code, if the Second Appeal is not competent. That may be done at the discretion of the Court provided questions of jurisdiction are raised in the Revision. No doubt learned Counsel refers to certain errors having jurisdictional flavour. But even so interference under section 115, Civil Procedure Code, will not be in the interests of justice. The general trustee initiated proceedings under section 87 of the Hindu Religious and Charitable Endowments Act for the issue of a certificate to get possession from the defendants as special trustees. These proceedings were dropped on the joint memo. filed on behalf of the defendants. It may be that the 2nd defendant himself might not have signed it. It may be that it is open to challenge on the various grounds raised by learned Counsel for the appellant. I do not want to go into the merits of these contentions at the present juncture. One of the points raised by learned Counsel for the appellant is that the memo. does not even purport to be for a limited period : its terms are vague and therefore cannot be enforceable. But the fact remains that the proceedings originally initiated under section 87 were dropped in view of this consent memo., and the present appellant had no need to contest the same then. The jurisdiction to interfere being discretionary and as in my view the plaintiff-Devasthanam would be out of time to take effective steps to recover any income from the defendants for the period in question in the event of the appellant succeeding on some technical plea interference is not called for under section 115, Civil Procedure Code. One of the contentions of the appellant is that the general trustee had no power to condone the appellant's acts and claim the income as per the joint memo. : in effect the appellant is pleading his own alleged illegal acts, in defence. I am therefore not permitting the appellant to convert the proceedings into a Revision under section 115, Civil Procedure Code. The Second Appeal is therefore dismissed. It is made clear that none of the contentions raised on behalf of the 2nd defendant is decided in these proceedings. Any opinion that might have been expressed in these proceedings will not be binding between the parties in future proceedings.

In view of the circumstances already referred to above, the plaintiff will not be entitled to any costs of the proceedings right through in all the Courts, from the 2nd defendant. The plaintiff will not be entitled even to the costs of the memorandum of cross-objections which has been allowed by the lower appellate Court. I am making this order as to costs bearing in mind that the claim of the plaintiff in respect of two years is barred by limitation. Even though the question of limitation has been considered by me in favour of the appellant, this is not a matter where interference is mandatory under section 115, Civil Procedure Code. It is in these circumstances that the plaintiff is deprived of his costs right through.

No leave.

V.S. — *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Special Original Jurisdiction.)

PRESENT :—MR. JUSTICE K. SRINIVASAN.

Manghraj Thekurdas .. *Petitioner**

v.

The Accommodation Controller of Madras .. *Respondent.*

Madras Buildings (Lease and Rent Control) Act (XVIII of 1960), *section* 3—*Power of Government under—If can permit a person no longer in Government service to continue in occupation—If could re-allot the premises on such person vacating.*

The Government's power to requisition a premises and allot the same to a Government servant stems from section 3 of the Madras Buildings (Lease and Rent Control) Act and it is obvious from the provisions of the section that if the Government has no use for the building either for the purpose of the State or of the Central Government or for an employee of such Government the Government have

* Writ Petition No. 120 of 1964. 21st June, 1965.

no further right to retain control of the premises. Where a right has been conferred on the Government to exercise powers in certain eventualities the power should be exercised only within such limits set by the Statute.

Where the Government is the statutory tenant under the Act they can hold the premises only for the purposes mentioned in the Statute. If within a reasonable time, after a Government servant vacates a building (say a month or two) the Government allots the building to another Government servant they would be within their rights. But where the Government allows the family of an ex-Government servant to continue in occupation for a number of years, it is not a purpose envisaged or authorised by the Statute and on such persons vacating the premises the Government cannot purport to exercise their power of re-allotment of the building to another Government servant.

Petition under Article 226 of the Constitution of India, praying that in the circumstances stated therein, and in the affidavit filed therewith the High Court will be pleased to issue a Writ of *certiorari* calling for the records pertaining to the order in Ref. No. A-4/30937 of 1963 dated 24th January, 1964 on the file of the Accommodation Controller, Madras, allotting the premises No. 16, New Avadi Road, Kilpauk, Madras-10 to Mr. A. J. Arnold, III Presidency Magistrate, Saidapet, Madras and quash the said order made therein.

S. K. L. Ratan of *K. C. Jocob*, *S. K. L. Ratan* and *R. Srinivasan*, for Petitioner.

K. S. Bakthavatsalam for Additional Government Pleader, on behalf of Respondent.

The Court made the following

ORDER.—Premises No. 16, New Avadi Road, Kilpauk, appears to have been taken over by the Government and allotted to a Government servant in the year 1952. In 1963, the petitioner purchased this premises from the previous owner. At that time, the first floor was occupied by one C. K. Nair and the ground floor by one Mrs. Sumati. The petitioner sought the release of the premises for the occupation of his son. He was informed that C. K. Nair was a Government servant and the first floor had been allotted to him by the Government. On a notice issued by him to the other tenant, she vacated the premises and handed over the key to the Accommodation Controller. Thereafter, the petitioner sought the release of the entire premises, but he was informed by the Accommodation Controller that the ground floor was being allotted to another Government servant. The petition originally proceeded on the basis that such an order of allotment had been made ten days after the intimation of the vacancy by Mrs. Sumati, but certain facts which came to the notice of the petitioner subsequently have altered the entire complexion of the case and these facts are as below. Mr. Sumati, who was originally allotted the ground floor, was an employee of the Central Government. It appears that on 12th December, 1959 he was transferred from Madras to Calcutta. Thereafter his wife, Mrs. Sumati, continued to occupy the premises, though Mr. Sumati as a Government servant who was no longer employed in the city of Madras, was not entitled to any allotment of accommodation. It further appears that this Sumati retired from Government service on 9th February, 1961. As stated already, after the petitioner's notice to Sumati, Mrs. Sumati vacated the premises on the 26th December, 1963.

In the course of the arguments, Mr. S. K. L. Ratan, learned Counsel for the petitioner, has pointed out that when Sumati ceased to be employed in Madras, the Government were not entitled to retain possession of the premises unless it was needed for any Government purpose or for the purpose of any Government servant. Mrs. Sumati, who was actually in occupation of the premises from 12th December, 1959 onwards, was certainly not so entitled to occupy it. The fact that from that date till the present day a non-Government servant was permitted to be in occupation of the premises, it is urged, should deprive the Government of any further right to allot the premises to a Government servant in 1964 and it is on this short ground that the order of allotment is sought to be quashed and a further order for restoration of possession of this part of the premises to the owner is also sought.

In the counter-affidavit filed by the Accommodation Controller, some of the facts have not been clearly disclosed. It is stated herein that K. Sumati, who had

been in occupation since 1952, intimated on 29th December, 1963 the intention to vacate the ground floor with effect from 25th December, 1963. The counter-affidavit reads as if this Sumati was entitled to be in occupation of the premises till the latter date. But, during the course of the arguments, learned Counsel appearing for the respondent does not deny the fact that Sumati ceased to be entitled to occupation of the premises from 12th December, 1959 onwards.

It is however further contended that the premises continued to be in occupation of the Government all along and that the allotment order made on 24th January, 1964, is within the scope of the powers of the Government.

It seems to me that the undisputed facts disclose a somewhat unfortunate state of affairs. It is now conceded on behalf of the Accommodation Controller that from and after 12th December, 1959 no Government servant was in occupation of the premises. The Government's power to requisition the premises and allot it to a Government servant stems from section 3 of the Madras Buildings (Lease and Rent Control) Act. It is obvious from the provisions of this Act that if the Government has no use for the building either for the purposes of the State or for the purposes of an employee of the State or of the Central Government, then the Government have no further right to retain control of the premises. That a non-Government servant was in such occupation for this lengthy period of five years is not denied, and no defence is put forward except the vague statement of the learned Counsel that the Accommodation Controller has no machinery with which he could check such occupations. It seems a singularly weak plea as far as I can see. Where a right has been conferred upon the Government to exercise certain powers in certain eventualities, that that power should be exercised only within such limits set by the statute cannot be gainsaid. It may be that on the vacating of the premises by a Government servant who was in occupation, there may be an interval of time before the premises could be allotted to another Government servant. The Government is the statutory tenant, but that they can hold the premises only for the purposes mentioned in the provisions of the Acts is beyond dispute. If within a reasonable time after the vacating of the premises by a Government servant, may be a month or two, the Government allot it to another Government servant or utilise the premises for their own purposes, they would be acting within the statute. But to say they were ignorant that the Government servant who had been allotted the premises had ceased to be a Government servant and they allowed the premises to be occupied by members of that ex-Government servant's family, and claim that they acted *bona fide* passes my comprehension. It is clear therefore that in the present case the retention of the premises during the last five years by the Government was not for any purpose envisaged by the statute.

In the circumstances of the case, I have no hesitation in holding that not only the order of allotment made by the Accommodation Controller should be quashed but there should be a further writ of *mandamus* directing delivery of possession of the premises (ground floor) to the owner, the petitioner. Though the facts are such as would merit an order awarding costs, in the somewhat peculiar circumstances of the case, I refrain from making such an order.

R. M. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Rangaswamy Gounder (Minor) and others .. *Appellants**

v.

Ramana Goundar .. *Respondent.*

Civil Procedure Code (V of 1908), sections 2 (2) and 47 (2)—Order converting a proceeding under into a suit—If appealable—Discretion of the Court in converting a proceeding into a suit—If could be interfered with.

Section 2 (2) of the Civil Procedure Code defines a "decree" as including the determination of any question within section 47 of the Code. Hence a determination of any question under section 47 will be appealable as a decree.

Section 47 (2) of the Code provides that subject to any objection as to limitation or jurisdiction the Court may treat the proceeding under section 47 as a suit. The Court is not concerned with the merits of the claim at that stage and where the lower Court has exercised its discretion and has ordered a conversion, it will not be open to the respondent to challenge the exercise of the jurisdiction as erroneous specially when the respondent would not be prejudiced by the conversion of the petition into a suit since he can urge all his grounds of defence in the suit.

Appeal against the order of the District Court, Coimbatore dated 8th April, 1964 and made in C.M.A. No. 119 of 1963 preferred against the order of the Court of the District Munsif of Tirupur dated 9th August, 1963 and made in E.A. No. 1245 of 1963 in E.A. No. 668 of 1963 in E.P. No. 1189 of 1962 in O.S. No. 430 of 1960.

G. N. Chari, for Appellants.

P. S. Ramachandran, for Respondent.

The Court made the following

ORDER.—The two sons and the wife of the judgment-debtor in O.S. No. 430 of 1960 are the appellants in this Second Appeal. O.S. No. 430 of 1960 was filed by the respondent herein against the father of the present appellants 1 and 2. A decree was passed against the father on 6th September, 1960. The decree-holder took out execution in E.P. No. 1189 of 1962 on 31st October, 1962 against the legal representatives of the judgment-debtor, as the judgment-debtor died after the passing of the decree. The legal representatives of the judgment-debtor, appellants 1 to 3 filed E.A. No. 668 of 1963 alleging that the decree against their father was obtained by fraud and collusion and that the decree is not valid and executable. In July 1963 the appellants herein filed E.A. No. 1245 of 1963 praying for conversion of their application E.P. No. 668 of 1963 into a suit. The trial Court directed the conversion. But on appeal by the decree-holder the lower appellate Court set aside the order of the executing Court and refused conversion. This C.M.S.A. is against the order refusing conversion passed by the lower appellate Court.

Mr. G. N. Chari, learned Counsel for the appellants, raised two contentions. He submitted that an appeal against an order passed under section 47 (2) of the Code of Civil Procedure, is not maintainable and therefore the order of the lower appellate Court is without jurisdiction. Secondly he submitted that the lower appellate Court was in error in interfering with the discretion exercised by the trial Court in converting the petition into a suit. Learned Counsel in support of his submission that an order under section 47 (2) directing conversion of a petition into a suit is not appealable relied on a decision of this Court in *Ramanuja Naicker* v. *Solaiappa Naicker*[1]. In that case a petition for conversion of an application into a suit under section 47 (2) was dismissed by the Subordinate Judge. There was no appeal preferred against the order directing conversion of the petition into a suit. The District Judge though aware of the fact that there was no appeal against the said order granted permission to convert the application into a suit. The High Court held that the decree in so far as it directed the conversion of the petition into a suit was wrong. In the course of his judgment the learned Judge observed as follows :

* A.A.A.O. No. 90 of 1964. 23rd June, 1965.

1. (1930) 60 M.L.J. 471.

"I doubt whether the learned Judge had any jurisdiction to set aside the order of 5th September, 1924. There could be no appeal from it and the learned Judge had no power of revision. In any case I think the learned Judge should not have interfered with the order of the Subordinate Judge of 5th September, 1924, nor was it a case in which he ought to have, of his own accord, made an order under section 47 (2)."

From a reading of the above passage it cannot be said that the learned Judge has specifically held that no appeal lies against any order under section 47 (2). The Learned Judge expressed a doubt about the District Judge having jurisdiction to set aside the order of the trial Court. This is because there was no appeal before the District Judge. The learned Judge proceeded to state that in any event the District Judge should not have interfered with the order of the Subordinate Judge. The above extract of the judgment would show that the learned Judge has not specifically decided that there is no appeal against an order under section 47 (2). I find considerable difficulty in holding that no appeal lies against an order passed under section 47 (2), for section 2 (2) of the Code of Civil Procedure, which defines 'decree' provides that "it shall be deemed to include the determination of any question within section 47." A determination of any question within section 47 is deemed to be a decree and is appealable. The definition was not brought to the notice of the learned Judge. In the circumstances I am unable to agree with the contention of the learned Counsel that the decisions in *Ramanuja Naicker* v. *Solaiappa Naicker*[1] has specifically held that no appeal lies against an order under section 47 (2). On merits learned Counsel submitted that he sought to have the petition converted into a suit as his contention was that the promissory note that was executed by the judgment-debtor was in pursuance of a fraud and is not binding and the decree is not binding on the legal representatives. It is unnecessary to go into the merits of this contention. The executing Court on the allegations came to the conclusion that this is a fit case for converting the petition into a suit. Section 47 (2) of the Civil Procedure Code, provides that the Court may subject to any objection as to limitation or jurisdiction, treat a proceeding under section 47 as a suit. It cannot be said that the exercise of the jurisdiction by the trial Court is erroneous. The reasons given by the lower appellate Court for interfering with the order converting the petition into a suit by the executing Court is not sustainable. The lower appellate Court has attempted to discuss the merits of the petition which is unnecessary for the purpose of deciding whether the conversion of the petition into a suit is right or not. The respondent would not be prejudiced by the conversion for whatever grounds which he may have to urge he will be entitled to urge them in the suit.

In the result I set aside the order of the lower appellate Court dismissing the petition for converting the petition into a suit and restore the order of the Trial Court. There will be no order as to costs.

Leave refused.

R.M. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE R. SADASIVAM.

D. Balasubramania Mudaliar .. *Petitioner**

v.

Doraikannu Ammal and others .. *Respondents.*

Madras Hindu Religious and Charitable Endowments Act (XXII of 1959), *section* 101—*Scope of—Person claiming to be in possession of temple property as hereditary trustee—If could be summarily proceeded against.*

Criminal Procedure Code (V of 1898), *section* 345—*Criminal revision—Death of party—If legal representatives could be brought on record.*

Section 101 of the Madras Hindu Religious and Charitable Endowments Act exempts from the summary procedure under it only persons claiming in good faith to be in possession of the properties on their own account. Merely because a person claims to be a hereditary trustee, which claim has

1. (1930) 60 M.L.J. 471.

* Cr.R.C. No. 1177 of 1964.
Cr.RP. No. 1151 of 1964.

16th July, 1965.

been negatived and an appeal has been filed, it is no ground to deny the summary procedure under section 101 of the Act. Persons who claim to be hereditary trustees and question the jurisdiction of the Area Committee or the Deputy Commissioner to appoint a trustee under the Act may have other remedies open but they will not be entitled to resist an application by the lawfully appointed trustee to recover possession of the temple or its properties.

There is no provision in the Code of Criminal Procedure, to implead the legal representatives of a party in a Criminal Revision Case. Further, in the absence of any specific provision, the proceedings cannot be continued against the legal representatives. The only provision in the Code where the legal representatives can be made a party are those specified in section 145 (7) and 431 of the Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate (J) Chingleput dated 14th July, 1964, and made in Criminal M.P. No. 246 of 1964.

K. E. Rajagopalachari, for Petitioner.

D. V. Sivagnanam, for Respondents.

S. R. Srinivasan, for Public Prosecutor on behalf of State.

The Court made the following

ORDER :—Petition by one D. Balasubramania Mudaliar to revise the order of the District Magistrate of Chingleput, dismissing his petition under section 101 of the Madras Hindu Religious and Charitable Endowments Act, 1959, for delivery of possession of Sri Kailasanathar temple, Big Natham, Chingleput. The petitioner has been appointed as a trustee of Sri Kailasanathar temple for a period of five years from 21st September, 1960. He filed a petition under section 101 of the Hindu Religious and Charitable Endowments Acts, 1959, for delivery of possession of the said temple. The first respondent is the sister and the second respondent is the husband of the third respondent who claimed to be the hereditary trustee of the temple. Respondents 1 and 2 claimed possession only on behalf of the third respondent. But the claim of the third respondent as hereditary trustee was negatived by the Deputy Commissioner of the Hindu Religious and Charitable Endowments Board in O.A. No. 120 of 1960 on its file as evidenced by Exhibit P-2. It is stated by the learned Advocate for the respondent that the third respondent has preferred an appeal to the Endowments Board and that the appeal (No. 63 of 1961) is pending. But till the third respondent succeeds in the appeal she cannot resist the claim of the petitioner to be put in possession of the temple.

The learned District Magistrate relied on the decision in *Subba Chetty* v. *Munuswamy Chetty*[1] cited by the learned Advocate for the third respondent in support of his order. It was held in that decision that in cases where a person in possession of the property claimed title in his own right, in the absence of any evidence and finding that he was an ex-trustee and in that capacity continued in possession, he could not be ousted by a summary order under section 87 of the Hindu Religious and Charitable Endowments Act, 1951. *Somasundaram Pillai and others* v. *Muthirulappa Pillai and another*[2], I have pointed out that the said decision could hardly be invoked in a case like the present one. It is clear from the facts of the case in *Subba Chetty* v. *Munuswamy Chetty*[1] that the petitioner therein not only claimed title in his own right but also contended that he was an ex-trustee or ex-officer of the temple. The third respondent herein claimed only as a hereditary trustee. But as already pointed out, her claim was negatived by the Deputy Commissioner and her appeal is pending. In the unreported decisions in *Srinivasa Narasimhachariar* v. *Ethiraja Pillai*[3] and *Poongavana Goundar and others* v. *Rangaswami Udayar and others*[4] this Court has held that the person who claims rights as hereditary trustee and questions the jurisdiction of the Area Committee or the Deputy Commissioner to appoint a trustee under the Act may have other remedies open to him, but he is not entitled to resist an application by the lawfully appointed trustee to recover possession of the temple or its properties. In *Subbaraya Mudaliar* v. *Nachimuthu Mudali*[5] Kailasam, J., has taken the same view.

1. (1957) 2 M.L.J. 161.
2. Crl. R.C. No. 686 of 1961.
3. Crl.R.C. No. 282 of 1961.
4. Crl.R.C. No. 394 of 1961.
5. (1965) 1 M.L.J. 359 : (1965) M.L.J. (Cr.) 199.

He has held in that decision that, when persons are appointed trustees to non-hereditary temples, by virtue of their appointment they are entitled to possession of the temple as a trustee is no more entitled to be in possession and that he will be a trustee, 'otherwise not entitled to be in possession' under section 101 of the Act. He has also pointed out that section 101 of the Act exempts only person claiming in good faith to be in possession on his own account.

During the hearing of the arguments on this petition, it was brought to my notice by the Advocate for the respondents that the third respondent is dead and that he is taking steps to add the legal representatives in the appeal before the Commissioner of the Hindu Religious and Charitable Endowments Board. The learned Advocate for the petitioner wanted to implead the legal representatives of the third respondent in the present petition, but there is no provision in the Code of Criminal Procedure to implead the legal representatives of a party in a Criminal Revision Case. In fact, in the absence of any specific provision in the Code of Criminal Procedure, the proceedings cannot be continued against the legal representatives. There is one provision under section 145 (7), Criminal Procedure Code, under which when any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and continue the enquiry. The only other provision, so far as I am aware of, is section 431, Criminal Procedure Code, which provides that every appeal under section 411-A, sub-section (2), or section 417 shall finally abate on the death of the accused, and every other appeal under that Chapter (except an appeal from a sentence of fine) shall finally abate on the death of an appellant. Thus in the case of the death of an appellant, the appeal could be prosecuted by a legal representative only in so far as it affects the estate of the deceased by reason of the fine imposed in that case.

Having regard to the above facts and circumstances, it is sufficient to set aside the wrong order of the District Magistrate, Chingleput, so that the petitioner may, if so advised, take steps to file a fresh application under section 101 of the Hindu Religious and Charitable Endowments Act, 1959, or initiate other proceedings against the persons now in possession of the temple and its properties.

R.M. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE P. S. KAILASAM.

Avudayappan Chettiar .. *Appellant**

v.

Kanthimathi Ammal .. *Respondent.*

Execution—Decree ambiguous—Power of executing Court to apportion liability between several judgment debtors—Power to construe the decree—Scope of—Decree—Construction of.

Civil Procedure Code (*V of* 1908), *Order* 21—*Power of executing Court—If can construe a decree properly by looking into the pleadings.*

Where a decree is ambiguous, it is the duty of the executing Court to construe the decree and for the purpose of interpreting the decree, when its terms are ambiguous the Court would certainly be entitled to look into the pleadings.

Though a decree for mesne profits was passed against all the judgment debtors jointly and severally when in substance it is against the several judgment debtors for their share of the mesne profits, the whole decree amount cannot be recovered from one of the judgment-debtors alone. The executing Court can apportion the amount of mesne profits leviable from each of the judgment-debtors even though the decree may not contain any such direction.

Where a decree is apparently against several persons for mesne profits in respect of specific items of property in their possession at specified rates, then each of them will be liable to pay under the decree only the amount pertaining to the property in his possession though the decree might be vauge in this regard. In the absence of a clear and unambigous decree making all the judgment-debtors jointly and severally liable for the entire amount it will be inequitable to levy execution against one of them alone for the entire amount.

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* A. A. A. O. No. 75 of 1962. 28th July, 1965.

Appeal against the order of the Court of the District Judge of Tirunelveli dated 12th March, 1962, and made in C.M.A. No. 92 of 1961 (E.P. No. 11 of 1961, in O.S. No. 322 of 1953 District Munsif's Court Ambasamudram).

T. R. Ramachandran, for *N. Varadarajan* and *Ramachandran*, for Appellant.

M. K. Hariharan, for Respondent.

The Court delivered the following

JUDGMENT :—This is an appeal by the third defendant in O. S. No. 322 of 1953 against the order of the District Judge, Tirunelveli, in C.M.A. No. 92 of 1961, directing execution against the third defendant for mesne profits.

The properties in dispute originally belonged to one Isakki Perumal. He left a will dated 16th September, 1930, by which he gave a life estate in the suit properties to his wife and the remainder to a trust. The widow executed a settlement in favour of the first defendant and another, by deed dated 16th September, 1944. The first defendant sold items 1, 2 and 3 to the second defendant on 18th February, 1952. The second defendant sold some of the properties to the sixth defendant. The third defendant, who is the appellant herein, purchased 85 trees from the second defendant. The trees were on items 1, 2 and 3. Defendants 4 and 5 are the lessees of items 1 to 3. The (*Madam*) trust filed the suit, O.S. No. 322 of 1953 for recovery of the items of property which Isakki Perumal bequeathed to it by will dated 16th September, 1930. The suit was contested by defendants 1, 2 and 6. A decree as prayed for by the plaintiff was passed on 31st January, 1955, and an appeal by defendants 1, 2 and 6, A.S. No. 11 of 1956, was dismissed on 22nd February, 1956. The decree-holder filed several execution petitions. It is unnecessary to refer to the various execution petitions filed. In E.P. No. 11 of 1961, the decree-holder sought to recover a sum of Rs. 533 as mesne profits, and Rs. 264 as costs. The third defendant objected on the ground that he was liable to pay mesne profits in respect of item 4, that is, for the 85 trees that were found on the land, at Rs. 10 per annum, that he paid a sum of Rs. 179-12-6 towards costs on 23rd August, 1955, and he cannot be proceeded against except for realising Rs. 20 which will be the mesne profits for item 4 between the date of the plaint 3rd December, 1953, and the date of execution. It was held by both the Courts that the decree that was passed in O.S. No. 322 of 1953 was a joint and several one and that the decree-holder is entitled to realise the entire mesne profits from any one of the defendants. This appeal is preferred against the order dismissing the petition of the third defendant. It may also be mentioned that the third defendant filed I.A. No. 669 of 1961 for amending the decree in O.S. No. 322 of 1953 to make it clear that the third defendant was liable only regarding mesne profits for item 4. This petition was dismissed. The decree that is sought to be executed is in the following terms :

"1. That it be and is hereby declared that the suit properties described hereunder belong to the plaintiff Madalayam and that the defendants do put the plaintiff in possession of the same ;

2. That the defendants do pay to the plaintiff future mesne profits from 3rd December, 1953, the date of plaint till delivery of possession, at the rate of 11 kottahs of paddy per annum in respect of items 1 to 3 of the suit properties and Rs. 10 per annum in respect of item 4 (palmyra trees) of the suit properties."

We are concerned with the second clause in the decree. The decree is that the defendants do pay the plaintiff future mesne profits from 3rd December, 1953, the date of plaint, till delivery of possession, at the rate of 11 kotahs of paddy per annum in respect of items 1 to 3 of the suit properties, and Rs. 10 per annum in respect of item 4 (palmyra trees) of the suit properties. As a matter of fact, it is not in dispute that defendants 1, 2 and 6 are in possession of items 1 to 3 and they are the persons who collect the yield from the lands. It is also not disputed that the third defendant-appellant is in possession of item 4, that is, the 85 trees, and the income from the 85 trees is admitted to be Rs. 10 per annum. Mr. Ramachandran, learned Counsel for the appellant, would submit that the decree should be construed as reading that defendants 1, 2 and 6, who are in possession of items 1 to 3, are to pay mesne profits

at 11 kotahs of paddy for items 1 to 3, and defendant 3 Rs. 10 in respect of item 4 of the suit properties. On the other hand, Mr. Hariharan, learned Counsel for the respondent, submitted that the Court is entitled to pass separate decrees or joint and several decrees, and, in this case, the Court having passed a joint and several decree, the third defendant cannot be heard in execution to plead that the decree should be construed as a separate decree.

There is some ambiguity is Clause 2 of the decree. It is not clear whether in drafting the decree it was intended that the third defendant should also be held to be jointly and severally liable. The learned Counsel for the appellant relied on a decision in *Topanmal* v. *M/s. Kundomal Gangaram*[1] where it was held that when the decree is ambiguous, it is the duty of the executing Court to construe the decree, and for the purpose of interpreting the decree when its terms are ambiguous, the Court would certainly be entitled to look into the pleadings. The pleadings in the case and the judgment were looked into and it is clear that the relief asked for against the third defendant was only as regards item 4. It does not also appear that the trial Court intended to make the third defendant liable for the entire mesne profits. As the decree is ambiguous, the real intention can be ascertained. The contention of the learned Counsel that it was not intended to make the third defendant liable for the entire decree has to be accepted. In *Sheobalak Singh* v. *Achutanand Singh*[2], it was held that though a decree for mesne profits was passed against all the judgment-debtors jointly and severally, if, in substance, the decree was against the various judgment-debtors for their shares of the mesne profits; the whole amount cannot be recovered from one judgment-debtor alone. Even in the absence of any direction in the decree, it was held that the executing Court should apportion the amount of mesne profits leviable from each of the judgment-debtors. The Patna High Court relied on a decision of the Privy Council in *Gurudas Kundu* v. *Hemandra Kumar*[3] where their Lordships observe that it would be the height of injustice to hold a defendant liable for mesne profits which he had not got but somebody else got. The two decisions were sought to be distinguished by the learned Counsel for the respondent by relying on a decision in *Sundarsan Prasad* v. *Jadunandan*[4]. It was held in that decision that the decree was intended to be joint and several, as all the defendants were trespassers and all of them intended to enjoy the property. The facts are not applicable to the present case.

In the result, I agree with the contention of the learned Counsel for the appellant that the decree cannot be construed as a joint and several decree. The third defendant can only be liable to the extent of his enjoyment of item 4, that is, Rs. 10 per annum.

Mr. Hariharan, learned Counsel for the respondent, submitted that the appellant is barred by *res judicata* from denying his liability, as this contention was put forward in the several execution petitions taken by the decree-holder. The learned Counsel is not able to produce any execution petition in which execution was levied for the entire mesne profits against all the defendants. Therefore, it cannot be said that the appellant is barred by *res judicata*.

It was further contended that the order in I.A. No. 669 of 1961, wherein the petition for amendment of the decree was refused, would operate as *res judicata*. The Court refused to amend the decree on the ground that the decree was in conformity with the judgment. So far as that decision is concerend, it would operate as *res judicata*, but the reasons given for the decision are not *res judicata*. It is open to the appellant to ask the executing Court to construe the decree as it stands.

In the result, I find that the third defendant is liable to pay mesne profits at the rate of Rs. 10 per annum from 3rd December, 1953, the date of plaint, to the date of delivery of possession, 20th January, 1956. So far as costs are concerned, it is stated that the third defendant appellant has paid the entire costs. The order

1. A.I.R. 1960 S.C. 388.
2. A.I.R. 1943 Patna 80.
3. (1929) 58 M.L.J. 74: I.L.R. 57 Cal. 1: L.R. 56 I.A. 290.
4. A.I.R. 1947 Pat. 42.

as to payment of the costs against the third defendant will stand and he will not be entitled to recover the costs paid. No costs throughout in these proceedings. No leave.

R.M. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Unnamalai Ammal .. *Petitioner**

v.

P. A. J. Seyyadu Mohideen and others .. *Respondents.*

Civil Procedure Code (V of 1908), section 151 and Order 21, rule 93 and Civil Rules of Practice, Rule 203—Application for setting aside sale under—Refund of poundage—Claim by third party auction purchaser—If could be ordered.

Practice—Execution sale—Poundage—Nature and incidents of—When a certificate of refund can be given.

The poundage paid under the provisions of Order 21, rules 89 to 91 of the Civil Procedure Code in applications for setting aside an execution sale is in reality part of the purchase money. It is a fee or charge paid by the decree-holder for services he obtained from the Court and it is taken out of the sale proceeds. In cases where a sale is set aside under Order 21, rule 89 there could be no difficulty. But in cases where a sale is set aside under Order 21, rule 90 the Court has to give a definite finding as to the party who is responsible for the sale being set aside.

In cases where the fault is on the decree-holder who had put the Court in motion and an auction purchaser is aggrieved by the sale in his favour being set aside due to irregularities, the decree-holder will be liable to the auction purchaser for return of the poundage deducted. The auction purchaser is entitled to file a suit against the decree-holder for the poundage fees not returned to him and for interest on the purchase money, if it is found that the sale was set aside because of the fault on the part of the decree-holder.

In cases where a sale is set aside for the reason that there was no final decree in existence and the fault was not of the decree-holder nor of the judgment-debtor, it may be that in the interests of justice the Court may recommend a refund of the poundage deducted, for consideration of the Revenue Authorities. But this could only be a recommendation and nothing more.

But where in pursuance of a valid decree a sale is gone through and the sale is only voidable and not void and such a sale is set aside under Order 21, rule 90, there is no provision in law for a certificate of refund of the poundage.

Petition under section 115 of Act V of 1908 praying the High Court to revise the Order of the Court of the Subordinate Judge, Tuticorin dated 17th January, 1962, and in E.A. No. 12 of 1962, in O.S. No. 75 of 1955.

M. R. Krishnan, for Petitioner.

K. Gopalaswami, for Government Pleader, on behalf of State.

T. V. Balakrishnan, for 1st Respondent.

The Court made the following

ORDER.—This Revision has been preferred against an order of the learned Subordinate Judge of Tuticorin, who rejected an application made by a third party Court-auction purchaser for refund of the poundage paid by him on the sale being set aside on an application under Order 21, rule 90, Civil Procedure Code. The petition was headed, "Under section 151, Order 21, rule 93 and section 47, Civil Procedure Code". Of course section 47, Civil Procedure Code cannot apply in this case, the petitioner not being a party to the proceedings. So far as Order 21, rule 93, is concerned, even that in my opinion cannot apply to this case. It reads:

> "Where a sale of immovable property is set aside under rule 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid."

It is nobody's case that the poundage is paid to any other party. It is certainly not paid to the decree-holder or to the judgment-debtor.

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* C.R.P. No. 1120 of 1962. 3rd August, 1965.

As regards what is poundage, and to whom it goes there is a lucid exposition of it, if I may say so with respect, in a decision of this Court in *Parvathi Ammal* v. *Govindaswami Pillai*[1], thus:

> "This argument proceeds on a misconception of the nature of the poundage fees. As was pointed out by Mr. Ramachandra Ayyar in his able argument, what the purchaser claims is really a portion of the purchase money. It is from the payment made by him the Court makes a deduction for poundage and pays the balance to the decree-holder. Poundage is the fee levied in England by the Sheriff as remuneration for his service. In this country, as the officers of the Court conducting the sales are paid a fixed salary, a certain percentage of the purchase money is taken for purchasing stamps. In effect the fee is a charge paid by the decree-holder for the services he obtains from the Court. In England as well as in this country, this fee is taken out of the sale proceeds."

The other relevant rule which may be referred is rule 203 of the Civil Rules o Practice. This rule reads:

> "(1) If the sale is set aside under Order 21, rule 89 of the Code, the Court may make an order for payment by the judgment-debtor of the poundage and other costs and interest, it any, not covered by the proclamation of sale.
>
> (2) If the sale is set aside under Order 21, rule 90 of the Code, the Court shall determine whether any and what party is responsible therefor, and may order such party to pay the costs and expenses of the sale and may make an order that any other party entitled to have the property sold may have the conduct of the sale and may make an order for the resale of the property.
>
> (3) If the sale is set aside under Order 21, rule 91 of the Code, the Court may make an order for payment by the execution creditor of the poundage and other costs of the sale."

So far as the setting aside of a sale under Order 21, rule 89 is concerned, there can be no difficulty as the amount deductible for poundage from the deposit made by the purchaser could be refunded to him, when the sale is set aside thereunder pursuant to rule 203 (1). The difficulty comes in when the sale is set aside under Order 21, rule 90, Civil Procedure Code. Even assuming that the order of the Court under this rule for payment of costs and expenses could include also the poundage, the Court has to give a definite finding as to the party, who is responsible for the sale being set aside under Order 21, rule 90, Civil Procedure Code. In the present case the finding is, that it cannot be said that the execution creditor was in any way responsible for the sale being set aside. On this finding assuming that the Court has a power, it must be held that no order could be made in favour of the auction purchaser in this case.

It may however be pointed out that in *Parvathi Ammal* v. *Govindaswami Pillai*[1], it was held that a suit could be laid by the purchaser against the decree-holder for the poundage fees not returned to him and interest on the purchase money paid by him. Dealing with the duties of a decree-holder, it is pointed out that it is the duty of the decree-holder to put the Court in possession of the necessary information and to attend to the various requirements of the law in publishing and conducting the sale. It was observed that the Court cannot be proceeded against for the irregularity in execution, if it acted to the best of its information and without malice, and that the party, who puts the Court in motion is liable to the purchaser, who has been aggrieved. Where a sale has gone through the poundage is taken by the Court under its powers for the expenses incurred for the sale, and if for any reason an auction purchaser is aggrieved by an irregular sale, he could proceed only against the decree-holder, who had put the Court in motion. Of course, to make the decree-holder liable there must be a specific finding that the sale was set aside because of default on his part.

My attention was drawn to another decision of this Court in *Veeraghavalu* v. *Chengalamma*[2]. That was a case where the sales in execution of a mortgage decree were held to be nullities, there being no valid final decree in existence at the time when the sales were held. At page 409, Curgenven, J., observed :

1. (1915) 29 M.L.J. 467 : I.L.R. 39 Mad. 803 at 807.
2. (1934) 67 M.L.J. 99 : A.I.R. 1934 Mad. 409.

"Inasmuch as there was no final decree under which sales in execution could be held there can, I think, be little doubt that the sales themselves were nullities and upon this footing the case has been argued. The consequences of setting aside sales under Order 21, rules 89, 90 and 91, Civil Procedure Code are dealt with in Civil Rules of Practice Nos. 201 to 203, but these rules do not contemplate in any of these cases the making of a refund of the poundage on the part of the Government to a person by whom it has been paid or where it has been taken from the purchase money. There appears in fact to be no statutory power vested in the Court to enable it to make an order for the refund of poundage in any circumstances, and if such a power exists it must be derivable from the inherent power saved under section 151, Civil Procedure Code."

After referring to the decision in *Parvathi Ammal* v. *Govindaswami Pillai*[1], the learned Judge observed :

"In effect the fee is a charge made against the decree-holder for the services he obtains from the Court in holding the sale. Once that sale has been held it is not clear whether any means exists for obtaining a refund of the fee. In these Civil Revision Petitions accordingly I do not feel prepared to say that in deciding not to grant the refund, although the learned Subordinate Judge was perhaps wrong in thinking that the cancellation of the sale was made under Order 21, rule 90, he has actually refused to exercise his jurisdiction, because I am not satisfied that he indeed had jurisdiction to direct such a refund. The most that could be done in such a case would be to give a certificate to the party that the case was a fit one for a refund and leave it to the Revenue Authorities to comply with it. That is no more than a recommendation. But I am not at all clear that the Revenue Authorities would consider themselves to have authority to make such a refund."

In this case there can be no question, even though the Court may grant a certificate under its inherent powers of granting a certificate. In the above case the sale was held when there was no valid final decree in existence, and the fault was not of the decree-holder nor of the judgment-debtor. In such a case it may be desirable in the interests of justice to grant a certificate, so that the Revenue Authorities may consider it. But, when in pursuance of a valid decree, a sale has gone through and the sale is only voidable and not void and such a sale is set aside under Order 21, rule 90, there cannot be a grant of a certificate for refund. If it is found that the decree-holder is liable for the irregularity which led to the sale being set aside, no doubt the Court may, when it is approached in appropriate proceedings direct the refund. *Parvathi Ammal* v. *Govindaswami Pillai*[1], above referred to held that it will be open to the auction purchaser to proceed by way of a suit against the decree-holder. In this case it cannot be said that the Court erroneously refused to exercise its inherent powers to direct a refund, particularly in view of the finding that the execution creditor was not in any way responsible for the sale being set aside.

In the rsult the revision petition fails and is dismissed. No costs.

R.M. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE M. NATESAN.

Kuppuswami Reddiar .. *Petitioner**

v.

The Madras State Electricity Board by its Superintending Engineer, Vellore Electricity System, Vellore .. *Respondent.*

Provincial Small Cause Courts Act (IX of 1887), section 17—Scope of—Setting aside ex parte *order—Requirement of—Security bond—Compliance with—What amounts to.*

What section 17 of the Provincial Small Cause Courts Act requires is that within the period of 30 days security should be placed in the hands of the Court by the applicant in such manner that if ultimately accepted it should be sufficient to enforce the obligation upon him and make the money assured readily recoverable. The bond which should be filed into Court within the time should be a duly executed one. A draft bond executed by the judgment-debtor cannot satisfy the purpose. Security bond can be held to be duly tendered, if without any further voluntary act on the part of the judgment-debtor the security bond could be legally enforced.

While filing of a draft security bond may not be sufficient compliance with the requirements of the section, where the fair bond is filed within the time, though accepted or registered later, the applicant must be deemed to have complied with the section. The words 'give such security' in the section may be construed to mean 'tender such security'.

1. (1915) 29 M.L.J. 467 : I.L.R. 39 Mad. 803.

* C.R.P. No. 313 of 1962. 11th August, 1965.

Petition under section 25 of the Act IX of 1887 praying the High Court to revise the order of the Court of the District Munsif of Tiruvannamalai dated 29th July, 1961, and made in I.A. No. 157 of 1961 in S.C. No. 35 of 1961.

T. K. Subramania Pillai, for Petitioner.

G. Ramanujam, for Respondent.

The Court made the following

ORDER.—This revision arises out of proceedings to set aside an *ex parte* decree passed in a suit under the Provincial Small Cause Courts Act. The suit for recovery of a sum of Rs. 424-49 was posted for final disposal on 29th May, 1961. The defendant was absent and, on his Counsel reporting no instructions, setting the defendant *ex parte*, the suit was decreed. The defendant subsequently filed a petition to have the *ex parte* decree set aside, and the petition was accompanied by a draft security bond. The security was ordered to be tested and the petition was posted to 26th June, 1961. The matter got adjourned to 30th June, 1961, on which date the Amin reported that the security offered was sufficient. The Court directed the fair bond to be filed by 7th July, 1961. The fair bond duly registered on 5th July, 1961, could not be filed by 7th July, 1961, as the petitioner could not get the return of it from the Registrar's Office. There was delay in securing it even on 10th July, 1961. The petitioner filed a petition for excusing the delay in filing the fair bond and for acceptance of the fair bond. On behalf of the plaintiff-decree-holder it was contended that as the security had not been accepted within thirty days' time as allowed by law, the decree could not be set aside. The lower Court felt bound by the decisions of the Court and has dismissed the application.

Mr. T. K. Subramania Pillai, learned Counsel for the petitioner, contends that the Court below erred in rejecting the application in the view that the fair bond was filed out of time. It is submitted that the security offered by the draft bond has itself been found sufficient and all that is necessary is to tender the security. It is urged that in the circumstances it must be held that there has been a valid giving of security.

I am afraid that however hard and unfortunate the result may be, in the light of the decisions of this Court, it must be held that the petitioner cannot rely upon his having filed the draft security bond in time. In *Marimuthu Gounder* v. *Ponnammal*[1], a Division Bench of this Court has summarised the position thus :

> "To sum up, we hold that what section 17 of the Provincial Small Cause Courts Act requires is that within the period of 30 days security should be placed in the hands of the Court by the Applicant of such a nature that if ultimately accepted it should be sufficient to enforce the obligation upon him and make the money assured in its payment, or more readily recoverable. Judged by this test, a duly executed unregistered security bond would be sufficient compliance with the law, though not registered but subsequently registered, the delay in getting it registered being not due to any fault of the applicant."

The point to be noted is that the bond that must be filled into Court within the time limited is a duly executed bond. If such a bond had been filed, then it could be enforced without reference to the judgment-debtor. But a draft bond not executed by the judgment-debtor cannot satisfy the purpose. Security could be held to have been duly tendered if, without any further voluntary act on the part of the judgment-debtor, the security bond could be made legally enforceable and enforced. This Court in the above decision in fact, put a liberal construction on section 17 of the Provincial Small Cause Courts Act widening the principle from certain earlier decisions and adopted the decision of the Patna High Court in *Rajeswari Prasad Singh* v. *Brahmanand Lal*[2]. Extracts from the said judgment were set out by this Court as indicating what this Court considered to be the correct interpretation of what should be done to comply with the provisions of section 17 within the prescribed time. In the Patna decision, Khaja Mohammad Noor, J., observed :

1. (1956) 2 M.L.J. 25.   2. I.L.R. (1933) 42 Pat. 745.

"I also respectfully agreed with the decision of Sen, J., in *Kaleshwar Lal* v. *Satya Brata Banerji*[1] that filing of a draft security bond is not sufficient compliance with the provisions of section 17 of the Small Cause Courts Act. But here the question is, whether a duly executed bond (though not registered but subsequently registered) is a sufficient offer of security within the meaning of section 17 of the Small Cause Courts Act. In my opinion the criterion is this. Was the security which the party placed in the hands of the Court and which the Court ultimately accepted sufficient to enforce the obligation upon him? Judged by this test an unregistered security bond is, in my opinion sufficient compliance with the law, provided that the delay in getting it registered is not due to any fault of the applicant himself. In this case the applicant placed himself in the hands of the Court by giving the Court a fully executed bond."

Observations to similar effect are found in the judgment of the other learned Judge, Agarwala, J., in the Patna case :

"In the present case the bond that was tendered as security, as has already been pointed out by my learned brother, was properly executed, stamped and attested, and it was filed within the time allowed by law. The Court before which it was filed accepted the bond as security and directed the applicant to register it."

Learned Counsel for the petitioner drew my attention to a Full Bench decision of the Andhra Pradesh High Court in *Satyanarayana* v. *Ramabrahman*[2]. The question referred to the Full Bench was :

"What is the meaning to be given to words 'give such security for the performance of the decree in the proviso to section 17 of the Provincial Small Cause Courts Act (IX of 1887)?"

After referring to an earlier decision of the Madras High Court, the Full Bench observed :

"A later Bench decision of the Madras High Court in *Marimuthu Goundar* v. *Ponnammal*[3], however, showed preference for a mere liberal construction of the proviso........In taking this view, the learned Judges accepted with approval the reasoning in the decision of a Division Bench of the Patna High Court in *Rajeswari* v. *Brahmanand Lal*[4], where the terms of the proviso received a liberal construction."

No express departure from the decisions of the Madras and Patna High Courts is made by the Full Bench. After posing for consideration the question whether the filing in time of the draft bond, which was accepted by the Court after scrutiny after the period prescribed, would be a sufficient compliance with the provisions of section 17, the procedure ordinarily followed in Courts in that State is set out and ultimately it is observed :

"Very often due to the exigencies of work in Court, it may not be possible for the presiding officer to dispose of the application expeditiously within the time prescribed. It is not difficult to envisage cases where, for no fault of the applicant, the eventual order passed by the Court accepting the security bond is beyond the prescribed period. Should the party be penalised for the delays occurring in the Courts?"

And the Full Bench conclusion, as a result of the discussion was

"Where security is tendered within the time and proves, even though tested after the time eventually to be sufficient, the applicant must be deemed to have complied with the requirements of the proviso. The words 'give such security' may be construed to mean "tender such security"."

Learned Counsel contends that the Full Bench recognised the propriety of a proper draft bond containing security acceptable to the Court being filed in the first instance within the time, followed up later by a duly registered bond and submitted that it is desirable that the decision of this Court in the earlier Division Bench decision be reconsidered. I see no reason for any reconsideration. It must be noticed that the Andhra Pradesh High Court has not expressly departed from the reasoning of this Court in *Marimuthu Goundar* v. *Ponnammal*[3]. The final answer given by the Full Bench to the question referred, does not, in my view, differ from the view taken by this Court. The decision of the lower Court is, in the circumstances, unexceptionable. In the result the Revision Petition fails and is dismissed. There will be no order as to costs.

R.M. —— *Petition dismissed.*

1. 1926 Pat.L.T. 38.
2. (1960) 1 An. W.R. 24 : A.I.R. 1960 A.P. 230 (F.B.).
3. (1956) 2 M.L.J. 25.
4. I.L.R. (1933) 42 Pat. 745.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(Contempt Jurisdiction.)

PRESENT :—M. ANANTANARAYANAN, *Officiating Chief Justice* AND MR. JUSTICE P. RAMAKRISHNAN.

G. Hari Prasad .. *Petitioner**

v.

G. Vasantha Pai, Advocate, 337, Thambu Chetty Street, Madras-1. .. *Respondent.*

Contempt of Courts Act (XXXII of 1952), section 3—Rules framed under—Suit on the Original Side pending—Interlocutory application—Affidavit of defendant containing allegations against counsel for plaintiff—Letter by plaintiff's Counsel to Counsel for defendant demanding apology and intimating, on failure, of taking proceedings for defamation and referring to Bar Council—Application by defendant for contempt—Non-compliance with the prescribed rules—Proceedings rendered void and without jurisdiction—Subsequent deletion of offending portions in the affidavit—Contempt proceedings not affected—No contempt constituted by writing of the letter.

Pending an Original Side suit, the second defendant therein (petitioner herein) in the affidavit in support of an interlocutory application averred " that the plaintiffs (company) has shifted its registered office to a place adjacent to the office of its Counsel (respondent herein) so that he may be enabled to get affidavits made to his dictation, that the office is practically under the advice and supervision of the Counsel and its present activity is the prosecution of various proceedings against me and other defendants". The respondent thereupon sent a notice to the Counsel for the defendant stating " I intend proceeding against you in a Court of law in a suit for defamation and also to bring this to the notice of the Madras State Bar Council unless you unconditionally apologize to me and take steps to have the said paragraph deleted from your client's affidavit.........." The offending portions in the affidavit were subsequently deleted by the Judge before whom the suit was pending. The defendant filed an application for contempt originally on the Original Side which came up before a Bench for notice and final hearing. On the question of jurisdiction.

Held, under the Rules framed under the Contempt of Courts Act, in regard to a contempt committed before the High Court Judge, the Judge will have power to punish the offender forthwith. In other cases the Judge or Judges, as the case may be, will have to draw up a charge and send it to the Chief Justice, who will then send it to the Advocate-General for taking appropriate action.

The non-compliance with the prescribed rules will render the proceedings void and without jurisdiction.

The subsequent deletion of the offending portions in the affidavit cannot bring the contempt proceedings to an end. They will still require to be considered on the merits.

Even on the assumption, that the application has been validly presented and within the jurisdiction, what actuated the respondent was not a desire to interfere with the course of justice or to cause obstruction to it, but to protect himself from baseless and defamatory allegations. The respondent cannot be held guilty of contempt of Court.

Application under section 3 of the Contempt of Courts Act, 1952.

N. A. R. Sundaram, V. P. Raman, G. Ramaswamy and *N. R. Chandran*, for Petitioner.

G. Vasantha Pai, in person.

The Court delivered the following Judgments.

Ramakrishnan, J.—This application was filed by a private party, G. Hariprasad, for taking action by this Court for contempt under section 3 of the Contempt of Courts Act, 1952 (Central Act XXXII of 1952) against Sri G. Vasantha Pai, the respondent herein, an Advocate of this Court. The application, had a somewhat long and chequered history, but owing to certain developments subsequent to the filing of the application, the scope of the enquiry has been narrowed down to a considerable extent, and therefore, we propose to touch briefly on the several points raised in the present proceedings and which have formed the subject-matter of acute controversy between the rival parties.

The petitioner Hariprasad is the second defendant in C.S. No. 65 of 1964 which was a suit filed by the Amalgamated Commercial Traders (Private), Limited. The suit was pending before Sadasivam, J., sitting on the Original Side of this Court. Hariprasad filed I.A. No. 1858 of 1964 praying that the plaintiffs should be directed

* Contempt Application No. 7 of 1964. 19th August, 1965.

to offer security for the ultimate costs in the suit. In the affidavit filed in respect of the interlocutory application *inter alia* the following allegation was made by Hariprasad :

> " In Madras, the company has sold its only valuable property being premises 5, Deenadayalu Street even when a winding up petition C.P. No. 42 of 1960 was pending in this Hon'ble Court, and the sale proceeds have been utilised in one or other of the loan transactions referred to, for the benefit of the Morarkas.
>
> The Company has no staff in Madras except an attender now promoted as Assistant, Mr. Harry Kingsley. He is totally ignorant of the affairs of the Company but the company has shifted its registered office to 337, Thambu Chetty Street, in a room adjacent to the office of its Counsel Mr. G. Vasantha Pai, so that he may be enabled to get affidavits made to his dictation and executed by the said Mr. Harry Kingsley at his orders. The Madras office is practically under the advice and supervision of Mr. Pai and its present almost sole activity is the prosecution of various proceedings against me and the other defendants in the manner aforestated."

Sri Vasantha Pai construed this as defamatory as well as an untrue statement, deliberately made by Hariprasad actuated by personal malice, and thereupon he sent a notice to Sri V. V. Raghavan and Sri D. R. Sivagnanam, Counsel who appeared for Hariprasad in the interlocutory application wherein, after extracting the remarks made about him, he stated :

> 'I intend proceeding against you in a Court of law in a suit for defamation and also to bring this to the notice of the Madras State Bar Council, unless you unconditionally apologise to me and take steps to have the said paragraph deleted from your client's affidavit within three days from to-day.'.

The petitioner Hariprasad in his turn, construed this notice as a threat for coercing him and his Counsel to withdraw the allegations made by him in the interlocutory application pending before Sadasivam, J., even before that Judge had adjudicated on the application, and therefore, it constituted a direct interference in the course of the administration of justice. Hariprasad went on to allege that the threat had interfered with the peace of his mind, that Sri Vasantha Pai had acquired the reputation of a fighter, in sensational cases, besides being a vengeful fighter, that threats from him had therefore extra coercive power, and that timid Counsel like those who have appeared for Hariprasad might readily succumb to such threats.

The application was filed originally on 2nd November, 1964 under Order 19, of the Original Side Rules, in which event it should have come for disposal before the Judge sitting on the Original Side, Sadasivam, J., but the High Court's Office returned it stating that it was doubtful if the application would fall under Order 19 of the Original Side Rules, since Sri Vasantha Pai was not a party to the suit in which the contempt was alleged to have been committed. Thereupon, the petitioner re-presented the application stating that he had struck-off the reference to Order 19 of the Original Side Rules and prayed that the application might be numbered as one falling under section 3 of the Contempt of Courts Act. Thereafter, the application seems to have come before a Bench of this Court consisting of one of us (Anantanarayanan, J.) and Ramamurti, J., who passed an order admitting the application on 10th November, 1964, after hearing counsel. They also directed the issue of the notice to the respondent returnable by 24th November, 1964.

The respondent Sri G. Vasantha Pai filed a counter-affidavit on 23rd November, 1964, and a supplemental affidavit on 30th November, 1964, to which the petitioner filed a rejoinder on 2nd December, 1964. The respondent took the stand that he was acting within his rights in asking the Counsel for the petitioner, to delete the objectionable remarks in the affidavit, and that the allegations made were actuated by personal malice against him. The counter-affidavit of Sri Vasantha Pai thereafter traversed a very wide ground, containing a gist of several controversial litigations past and present in which he had appeared and incidentally he added a prayer that the present proceedings might be heard by my learned brother and some other Judge, who would not be affected by the several allegations made in the application, it being implied that Ramamurti, J., who then sat with my learned brother, was one of the judges who would thus be affected. My learned brother Anantanarayanan, J. and Ramamurti, J., passed separate orders stating that it would not be proper to comply with this request, giving reasons for their conclusion. Thereafter, Sri Vasantha Pai filed a further counter-affidavit on 29th January, 1965, traversing the

rejoinder of the petitioner dated 2nd December, 1964. The main burden of the claim in this supplemental affidavit was that the petitioner by certain of his allegations, was endeavouring to prejudice the mind of Ramamurti, J., who was one of the Judges who sat in the Bench. Thereafter, the application came up before my learned brother and Natesan, J., for hearing on 29th March, 1965. It may be relevant to point out at this stage, that one of the allegations made by Sri Vasantha Pai was regarding certain alleged irregularities in the posting of the application from its inception. According to him, after 24th September, 1964, Sri S. Ramachandra Iyer, the former Chief Justice of Madras, was not sitting in Court. Subsequently, he tendered his resignation which was accepted by the President of India with effect from 1st November, 1964. The respondent proceeded to allege that there was no Chief Justice *de facto* for this Court from 24th September, 1964, and *de jure* from 1st November, 1964, till the Officiating Chief Justice was appointed on 25th November, 1964. Therefore, he contended that the proceedings submitting the contempt application, and the order of the former Chief Justice passed after 1st November, 1964, directing it to be posted before the Bench consisting of my learned brother and Ramamurti, J., were all without jurisdiction. Not satisfied with this allegation, Sri Vasantha Pai expressed an apprehension in his counter-affidavit that the ex-Advocate-General Sri V. K. Thiruvenkatachari had a part to play in bringing pressure on the ministerial officer of the High Court, for posting the application before the aforesaid Bench of this Court, even though he definitely knew that the ministerial officer had no jurisdiction to do so.

This allegation about want of jurisdiction on the Bench that ordered notice to issue on 12th November, 1964, was considered by my learned brother and Natesan J., and orders were passed by them on 12th April, 1965, directing the application to be posted again for orders as to the issue of fresh notice to the respondent. The application came up accordingly on 28th April, 1965, before my learned brother and Natesan, J., and they directed the issue of fresh notice to the respondent returnable on 28th June, 1965. In answer to this notice, Sri Vasantha Pai filed a fresh counter-affidavit on 28th June, 1965. The gist of the allegation therein is that he was not present personally on 12th April, 1965, when the matter was heard, but he was represented by his counsel Sri Govind Swaminathan. Sri Vasantha Pai thereafter challenged the propriety of the orders passed on 12th April, 1965, and the further order pased on 28th April, 1965, directing the issue of fresh notice to the respondent, and alleged that such orders would not cure the defect in the admission and posting of the application in November, 1964. Since this Bench is sitting in continuation of the Bench who passed the aforesaid orders on 12th April, 1965, and 28th April, 1965, after full consideration of all the issues involved, we find no reason to reconsider the earlier orders aforementioned dated 12th April, 1965 and 28th April, 1965. We proceed therefore on the basis that the defects if any in the constitution of the Bench before whom the application was first posted to November, 1964 for admission and which ordered the issue of notice on 10th November, 1964, have to be deemed as remedied, in view of the subsequent orders passed on 12th April, 1965 and 28th April, 1965.

We proceed now to take up certain preliminary contentions raised by the respondent, whose consideration, in our opinion, will be sufficient to dispose of the matter without going into the further contentions raised by him regarding deliberate malice, which, according to the respondent, formed the motivating factor behind the affidavit of Hariprasad. We will consider these preliminary contentions under two headings:

1. The learned Judge on the Original Side, Sadasivam, J., by an order pronounced on 5th April, 1965, deleted the very portion in the affidavit of Hariprasad in I.A. No. 1838 of 1964 in C.S. No. 65 of 1964 to which Sri Vasantha Pai took objection in his notice to the counsel of Hariprasad[1]. Sadasivam, J., after referring to the above allegations in the affidavit of Hariprasad observed that there could be no doubt that several averments made therein were scandalous, that in his opinion they were

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1. *Amalgamated Commercial Traders v. Hariprasad* (1965) 2 M.L.J. 477.

totally irrelevant either to the application or to the suit, that they were not relied upon by the Advocates for the disposal of the applications, that the allegation about Sri Vasantha Pai in the affidavit was scandalous and defamatory, that there was absolutely no necessity to make that allegation in the affidavit, and that it was unfortunate that an affidavit containing such allegations had been filed. Thereafter, the learned Judge directed the offending passages to be expugned from the record.

One of the principal arguments of the respondent, Sri Vasantha Pai, in the present contempt application is that in consequence of the aforesaid order of Sadasivam, J., it should be held that as the objectionable remarks attributed to him and which formed the basis of the present contempt application became *non est* they shuld be treated as if they had never existed, thereby the very basis on which the contempt proceedings are initiated disappeared, therefore the application has to be dismissed. We are unable to agree with this contention, for the following reasons. The offence of contempt of Court is a quasi-criminal one. There is ample authority for this view, and it is unnecessary for us to quote them here. In our opinion, the expugning of the offending passages by Sadasivam, J., by his order dated 5th April, 1965, will have the effect of depriving the party, who made them, of the opportunity of relying on them in the civil proceedings. It will also relieve the opposite party from the need to controvert them in the same civil proceedings. But, in dealing with the matter as a question involving contempt, what we have to determine is whether by the making of the allegations in the affidavit an obstruction to the course of justice was likely to take place. The offence of contempt being quasi-criminal in nature, is to be deemed as completed, the moment the offending remarks have been made, and any subsequent order of Court expunging them will not have the effect of wiping out the wrong done, or the contempt committed. If, in fact, it is proved that the party who made the allegation was in contempt and proceedings have been initiated against him for contempt, they will necessarily have to proceed to their conclusion and, if contempt is proved, the party has to purge himself of the contempt. When once the factum of having been in contempt is established against him, he cannot take shelter behind the fact that the Court in collateral proceedings on the initiative of the opposite party had subsequently deleted the offending passages. In our opinion, such deletion cannot bring the contempt proceedings to an end. They will still require to be considered on their merits. We hold that this point raised by the respondent has no substance.

The second plea which Sri Vasantha Pai raised has, in our opinion, greater weight. According to him, the present application was not filed in strict conformity with the Rules framed by the High Court under the Contempt of Courts Act, 1952 dated 28th September, 1956. We have carefully examined the position in regard to this plea, and we proceed to give our findings below. This High Court as a Court of Record inherited the powers of the Crown jurisdiction in England to punish parties, for contempt of itself. The procedure for that purpose was originally provided in Order 21 of the Rules of the High Court (Original Side) 1927. (Subsequently revised as Order 19 of the Original Side Rules, 1956). This High Court later on found that these rules were not quite sufficient for the purpose in view, and issued Standing Orders in P. Dis. No. 588 of 1942. Rule 2 of the Standing Orders, states that all applications for committing a person for contempt of Court whether of the High Court or Courts subordinate to it, not being applications under Order 21 of the Original Side Rules of the High Court, 1927, or under Order 39, rule 2 (3) of the Code of Civil Procedure, shall be dealt with on the Crown side and filed and numbered as Contempt Application. Rule 3 states :

> "Every Contempt Application filed except when the contempt is alleged to have taken place in respect of a Judge of the High Court sitting alone shall be posted before the First Bench for orders as to issue of notice to the respondent and posted after service of notice for final hearing before the same Bench."

At the same time, the High Court felt it necessary to amend rule 2 of the Appellate Side Rules by incorporating rule 2 (5) in the following manner :—

> "(5) Every application for taking action for contempt of Court except when the contempt is alleged to have taken place in respect of a Judge of the High Court sitting alone."

The effect of this amendment is that every application for taking action for contempt of Court, except when the contempt is alleged to have taken place in respect of a Judge of the High Court sitting alone, has to come before a Bench of two Judges for disposal.

In 1952, the Contempt of Courts Act (Central Act XXXII of 1952) was passed. Section 5 of the Act gave powers of the widest amplitude to the High Courts to deal with contempt matters by giving it jurisdiction to enquire into or try a contempt of itself or of any Court subordinate to it, whether the contempt is alleged to have been committed within or outside the local limits of its jurisdiction, and whether the person alleged to be guilty of the contempt, is within or outside such limits. This rule appears also to cover the exercise of the inherent powers of the High Court which existed even before that Act, as a Court of Record, to deal with contempt of itself. Section 5 of the Act while preserving that power, widened its scope in the manner indicated by that section, with the result that a High Court can take action for contempt even against a person who is outside its jurisdiction. The Rules which this High Court framed in 1956 under the Contempt of Courts Act, purport to regulate proceedings for contempt of subordinate Courts as well as of the High Court, other than proceedings under Order 19 of the Rules of the High Court, Original Side, 1956. Rule 6 states that subject to these Rules, the rules contained in Order 19 of the Rules of the High Court, Original Side, 1927 shall apply as far as may be to all contempt proceedings. The effect of this provision is that the operation of the rules contained in Order 19, will be controlled by the Rules framed under the Contempt of Courts Act in 1956. In other words, the rules under Order 19 will apply only where the 1956 Rules under the Contempt of Courts Act, do not provide otherwise. Now, we proceed to extract rules 1, 2 and 3 of the 1956 Rules under the Contempt of Courts Act, which will be relevant for our consideration in this case :

"1 (*a*) Cases of contempt of Subordinate Courts referred to the High Court by them, shall first be dealt within the Administrative Side. They will be placed before the Judge in charge of the district, in which the Subordinate Court making the reference is situated, and the Chief Justice for directions to send the papers to the Advocate-General for taking appropriate action ;

(*b*) When the contempt consists of words or acts obstructing or tending to obstruct the administration of justice or when a Judge or Bench of Judges of the High Court is personally attacked the Judge or Judges may draw up a charge and send it to the Chief Justice. The Chief Justice will send it to the Advocate-General for taking appropriate action ;

(*c*) But when the contempt referred to in the preceding clause is committed in the face of the Court, the contempt being apparent, and the Court having full cognisance of the facts, the offender may be forthwith punished by the Judge or Judges of the High Court before whom it is committed.

2. Applications for contempt filed by the Advocate-General or by a party who is aggrieved by the action of the other party in cases in Subordinate Courts shall be presented in the Original Side Office and registered and numbered as Contempt Applications.

3. Every such Contempt Application shall be posted before the First Bench if the contempt alleged is of a subordinate Court and before such Bench as the Chief Justice directs if the contempt alleged is in respect of the High Court under rule 1 (*b*)."

Rule 1 (*a*) deals with cases of contempt of subordinate Courts and the procedure for dealing with them. We are not concerned with that rule in this case. Rules 1 (*b*) and 1 (*c*) are directly relevant when the contempt is of the High Court. They deal with three kinds of contempts : (1) contempt consisting of words or acts obstructing or tending to obstruct the administration of justice ; (2) contempt involving a personal attack on the Judge or Judges of the High Court, and (3) contempt falling within categories (1) and (2) above, but committed in the face of the Court, the contempt being apparent, and the Court having full cognisance of the facts.

Rule 1 (*c*) provides that in the case of the last mentioned category (3), the Judge or Judges of the High Court before whom the contempt is committed will have power to punish the offender forthwith. In cases of categories (1) and (2), where the circumstances do not bring a case within category (3), the Judge or Judges, as the

case may be, will have to draw up a charge or charges and send it to the Chief Justice, who will then send it to the Advocate-Geneal for taking appropriate action.

In the present case, the alleged contempt attributed to Sri Vasantha Pai was made in a notice which Sri Vasantha Pai sent outside the Court to Sri V.V. Raghavan and D. R. Sivagnanam, Advocates for Hariprasad. Hariprasad was of the opinion that by that communication an obstruction to the proceedings before a single Judge of this Court Sadasivam, J., was committed. It would amount to an interference with the administration of justice by Sadasivam, J., in the interlocutory application pending before him. The proper course thereafter for Hariprasad or his Counsel would be to approach the single Judge, Sadasivam, J., for getting a decision whether, the case would fall under rule 1 (*b*) or 1 (*c*) of the 1956 Rules. If Sadasivam, J., was satisfied that the contempt was apparent and was committed in the face of his Court, falling within category (3) above, it was open to him to punish the offender forthwith under rule 1 (*c*). But, if the learned Judge were to come to the conclusion on the other hand that the contempt fell under categories (1) and (2) mentioned above, then under rule 1 (*b*), he has to draw up a charge and send it to the Chief Justice. Thereafter, the further procedure under rule 1 (*b*) will apply. We would also like to point out that the petitioner purports to have filed the present application under section 3 of the Contempt of Courts Act. The 1956 Rules referred to above under the Contempt of Courts Act, will apply therefore for the purpose of the present proceedings. It would, therefore, follow that he is obliged to comply with the procedure, which we have just now indicated for dealing with the case. But he seems to have filed this application in the Original Side of this Court, and thereafter it came before a Bench of Judges. This procedure involevs non-compliance with the rules we have just now indicated, and the proper procedure was for the single Judge on the Original Side to deal with the initial question whether rule 1 (*b*) or rule 1 (*c*) would apply. Sri Vasantha Pai has raised elaborate contentions in his affidavit, that steps of doubtful propriety all actuated by malice against him, undertaken by various interested persons including senior members of the Bar, lay behind the filing of the application, and its being placed before a Bench of the Judges of the High Court, for admission. In view of the conclusion we have reached above, it is unnecessary for us to deal with these further contentions.'

Sri Vasantha Pai fortified his argument on this last mentioned contention by referring to Article 21 of the Constitution, that a contempt proceeding will have the effect of depriving the person in contempt of his personal liberty, and, therefore, it is necessary to follow the procedure established by law. He argued that the procedure established by law would be the procedure indicated in the Rules framed by the High Court in exercise of its powers under Article 225 of the Constitution, and such Rules include the 1956 Rules to which we have made reference framed under the Contempt of Courts Act. He relied upon a decision in *Taylor* v. *Ros*[1] which states that the Court will not condone a direct non-compliance with the rules upon an application affecting the liberty of the subject. He also referred to the decision in *Suraj Parkash* v. *The King Emperor*[2], a decision of the Federal Court. That is a case where the learned Chief Justice has observed that in cases to which section 270 of the Constitution Act (Government of India Act, 1935) applies, the words of the section require that if proceedings be instituted before sanction under the section is obtained, such proceedings are wholly void and new proceedings must be instituted after the sanction is obtained and that unless this view is strictly observed, the protection intended by the section would be liable to become in practice seriously reduced. Sri Vasantha Pai wants to draw an analogy for the purpose of this case by stressing that the initial scrutiny by the learned Chief Justice and the Advocate-General, which will take place if the provision under clause 1 (*b*) had been correctly followed, is a valuable protection to the party alleged to be in contempt, and proceedings taken without conforming to these requirements should be deemed to be void, and new proceedings should be initiated.

1. 68 L.T. 213.
2. (1945) 1 M.L.J. 371.

We are of the opinion that Sri Vasantha Pai's plea that the 1956 Rules for dealing with Contempt Applications have not been properly complied with in this case has to be upheld.

A further contention urged by Sri Vasantha Pai is that even assuming for the sake of argument, that the non-compliance with the 1956 Rules, will not deprive this Bench of jurisdiction to deal with the case, that is now before us, he must be deemed to be not in contempt. We will now deal with this argument briefly. The basis of the contention put forward by the respondent is that in making the statements objected to, because the statements were false, besides being defamatory, he was acting purely in defence of his honour and reputation, and that in asking the petitioner to delete them under threat of Court proceedings, his paramount intention was not to interfere with the administration of justice. For supporting this claim, he relies on the finding of Sadasivam, J., to which we have made reference. That finding has become conclusive, and we have got to stand by that finding.

The proposition has been stated by the Supreme Court in *Pratap Singh* v. *Gurbaksh Singh*[1]. Thus :

"The action taken in this case against the respondent by way of a proceeding against him could have only one tendency, namely, the tendency to coerce the respondent and force him to withdraw his suit or otherwise not press it. If that be the clear and unmistakable tendency of the proceedings taken against the respondent, then the officials concerned had been guilty of contempt of Court."

In *Ch. Rajender* v. *Uma Prasad*[2] the Allahabad High Court held that sending threatning notice to defendant in pending suit to withdraw a plea taken by him in the written statement is contempt and that the Pleader who sends it himself on behalf of his client is also guilty of contempt. To a similar purport is the decision in *Telbara Cotton Ginning Co.* v. *Kashinath*[3] where it has been held that where a person addressed a notice to a Counsel demanding that certain allegation in the written statement of his client should be withdrawn unconditionally and an apology tendered on pain of legal proceedings being taken against him, the addressing of such a notice was calculated to interfere with and to obstruct or divert the course of justice, and the person was guilty of contempt of Court.

The respondent before us submits that to the broad proposition stated in the above decisions, there are certain exceptions, and he is entitled to rely on them. These exceptions have been discussed and considered in great detail in a decision of the Allahabad High Court reported in *Kamta Prasad* v. *Ram Agyan*[4]. In that case, a party sent a notice to the opposite party who had filed a criminal complaint against him for criminal breach of trust. In the notice, after setting out the facts of the case as he viewed them, he suggested an amicable settlement according to certain terms offered by him and then concluded by saying that in the event of the opposite party's disapproval of the fair proposal thus made, he should be constrained to proceed against him civilly and criminally. The learned Judges held that sending of such a notice could not be construed as interfering with the course of justice and there would be no contempt. After considering several authorities, they classified the law on the subject into five categories thus :

"(1) If there is a threat held out against a party to a legal proceeding not to proceed with the proceeding or to drop a plea which he had legitimately taken and the threat is that, if this is not done, then some harm will be caused to that party, either by way of a bodily injury or injury to reputation, or in some other way, the threat constitutes an intrference with the administration of justice and is contempt of Court, *Smith* v. *Lakeman*[5].

(2) If the threat is not express, but is implied in the fact of a party instituting a criminal complaint or taking some civil proceeding which puts the former party to loss, there is no interference with the administration of justice because everybody is entitled to take recourse to law—*Harishikesh Sanyal* v. *A.P. Bagchi*[6] and *Radhey Lal* v. *Niranjan Nath*[7].

(3) If there is a (simple) demand for payment of damages because of the use of some defamatory expression in a pending proceeding, and the demand is not coupled with a request for the

1. (1963) 1 S.C.J. 87: (1963) M.L.J. (Crl.) 49 : A.I.R. 1962 S.C. 1172.
2. A.I.R. 1935 All. 117.
3. A.I.R. 1940 Nag. 110.
4. I.L.R. 1950 All. 530.
5. (1856) L.R. 26 Ch. 305.
6. I.L.R. 1940 All. 710.
7. I.L.R. 1941 All. 364.

withdrawal of the pending proceeding, or a plea taken therein, the demand for damages does not amount to interference with the administration of justice—*Baldeo Sahai* v. *Shiv Dutt Sharma*[1].

(4) If there is a demand for the withdrawal of certain words or expressions used in a pending proceeding coupled with a threat that action will be taken if the words or expressions used are not withdrawn, then if the words or expressions were scandalous, unnecessary or irrelevant, such a threat does not amount to interference with the administration of justice—*Jagannath Prasad* v. *Ram Chandra and others*.[2]

(5) If the threat is that, unless a certain pending proceeding or plea taken therein withdrawn, a counter-action will be taken to protect one's own interest in the exercise of one's own right in the property or to take recourse to law upon a cause of action which has already accrued, or in the vindication of one's own honour, there is no interference with the administration of justice—*Webster* v. *Bakewell Rural District Council*[3]."

The respondent's contention is that the decision of Sadasivam, J., aforesaid to the effect that the words or expressions which he had asked to be deleted were scandalous, unnecessary and irrelevant, would support the propriety of his action in making a demand for their withdrawal under penalty of appropriate proceedings in a Court of law.

In stating proposition (4) in the manner extracted above, the Bench of the Allahabad High Court relied on one of their own unreported decisions. We do not have the original decision before us. In our view, the question whether the Court should take action for contempt or not must depend on the circumstances of each case, and there is a discretion to be exercised by the Court bearing in mind all the circumstances, including the conduct of the party who has made the application for punishing the respondent for contempt. In dealing with the present case, we cannot ignore the fact that the petitioner deliberately made certain remarks about the respondent which has been found by Sadasivam, J., in his order, to be unnecessary, irrelevant and defamatory. In such circumstances, it became relevant for us to consider whether the respondent was justified in making a demand for the withdrawal of those words or expressions. It appears to us that when the respondent insisted upon the deletion of these remarks, what actuated him was not a desire to interfere with the course of justice or to cause obstruction to it, but to protect himself from baseless and defamatory allegations. In view of the categorical findings of Sadasivam, J., the allegations did not also lead in fact, to the likelihood of obstructing the course of justice. In view of the above, in our opinion, the respondent cannot be held guilty of contempt of Court. It has been observed by a Bench of the Allahabad High Court, a decision which was referred to before us in this connection, in *R. X. Garg* v. *S. A. Azad*[4] at page 45 of the report, thus :

" It has also been held that where the intention and effect of a petitioner writing is not so much to interfere with the course of justice as to afford a reply to certain defamatory allegations made by the other party, the Court should stay its hand and not take any action unless substantial interference with the course of justice is likely."

Assuming that we have jurisdiction to deal with this case, our finding is that the present is one where the circumstances do not at all require the taking of any action for contempt against the respondent.

For the aforesaid reasons, the application is dismissed. There will be no order as to costs.

Anantanarayanan, O.C.J.—I agree and have nothing to add.

V.S. *Application dismissed.*

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1. (1939 A.L.J. 1157.
2. Criminal Miscellaneous No. 15 of 1948, decided on 9th February, 1949.
3. L.R. (1916) 1 Ch. 301.
4. A.I.R. 1957 All. 37.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. M. ANANTANARAYANAN, *Officiating Chief Justice*.

S. Balan .. *Petitioner* *

v.

R. Saraswathi Bai .. *Respondent*.

Practice—Application for condoning delay in 'filing appeal'—Affidavit of Advocate taking the blame for delay on himself—Duty of Court.

Where in an application for condoning delay in filing an appeal on the ground that the delay of four days was due to negligence or inaction of the Advocate entrusted with the case and the Advocate files an affidavit in which he took the blame on himself the Court should ordinarily accept the statement, unless indeed the circumstances are very exceptional. [There are no such circumstances in the instant case.] Advocates are really in the situation of Officers of Court with the duty to strictly fulfil their obligations to their clients and to Courts administering justice. They cannot and ought not to be merely regarded as agents of private parties.

Petition under section 25 (1) (*a*)(ii) of the Madras Act (XVIII of 1960) praying the High Court to revise the Order of the Court of the Small Causes at Madras (Chief Judge) dated 9th March, 1965, and made in M.P. No. 308 of 1965 in H.R.A.—(unfiled S.R. No. 4178-B) (H.R.C. No. 2299 of 1964, Rent Controller, Madras).

G. Radhakrishnan, for Petitioner.

C. Ramanna, for Respondent.

The Court made the following

ORDER.—After having heard learned Counsel on both sides, I am satisfied that, in the interests of justice, this Revision should be allowed. The facts are not in dispute. The learned Chief Judge of the Court of Small Causes, sitting in appeal under the Madras Buildings (Lease and Rent Control) Act, declined to accept an appeal from an order of eviction, which was presented before him, with a delay of four days. In other words, the learned Judge declined to condone this delay of four days.

In my view, the learned Judge was not justified in making such an order, as the delay was really due to the inaction or negligence of the learned Counsel for the party (appellant), who was entrusted by his client with the papers on 3rd December, 1964, so that he might obtain a certified copy of the order of the Rent Controller, for purposes of appeal, and who did not actually apply till 21st December, 1964. The Counsel filed an affidavit in the matter, in which he takes the blame upon himself in paragraph 3 of the affidavit.

In my view, when an Advocate comes forward with a submission in an affidavit of this character, it should ordinarily be accepted by Courts, unless, indeed, the circumstances are very exceptional. The learned Judge has proceeded to the length of stating that he was unable to accept the ground given by the Advocate for the delay, as due to inadvertence and pressure of work in the criminal Courts, particularly as he had no clerk to assist him. I need not point out that Advocates are members of the learned profession of the law and even apart from their duties to their clients, are really in the situation of officers of Court, with the duty to strictly fulfil their obligations to their clients, and to the Courts administering justice. They cannot, and ought not to be, merely regarded as agents of private parties, as the learned Judge appears to think. There are no reasons for me to believe that the affidavit of the Advocate is not true, or that it is not worthy of acceptance. I accept the affidavit, and, since it accounts for the delay, condone the delay and allow the Revision Petition.

The order of the learned Chief Judge is set aside, and the House Rent Appeal should now be admitted and disposed of on the merits according to law.

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*C.R.P. No. 513 of 1965. 3rd September, 1965.

Learned Counsel for the Revision Petitioner states that there is interim stay of delivery of the premises in his favour which will enure only till 9th September, 1965. I direct that the records be expeditiously transmitted to the Court of Appeal, and that the interim stay will continue till the end of this month, to enable the proceedings to be taken up and completed.

No order as to costs.

K.S. *Revision allowed.*

[END OF VOLUME (1965) II MADRAS LAW JOURNAL (REPORTS)].